

Supreme Court, U.S.
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No. 05 —

RECEIVED
SUPREME COURT OF THE UNITED STATES

In the
Supreme Court of the United States

JENNY WERNING, CHARLES BINGAMAN
and TROY CANNON,

Petitioners,

v.

ODELL THOMPSON, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Whether the Seventh Circuit's decision in this case conflicts with the settled precedent of this Court and/or conflicts with settled rules of law of other Circuit Courts of Appeal.
2. Whether the Seventh Circuit erred in extinguishing plaintiffs' claim for declaratory relief on grounds of qualified immunity.
3. Whether it was "clearly established" as of December 5, 2000, for purposes of determining qualified immunity, that the First Amendment bars State officials from requiring special permission before their employees are permitted to communicate with any "external agent" or the head of the agency for which the employees work, regarding their agency's policies and operations.
4. Whether the First Amendment bars State officials from retaliating against employees for requesting to speak to their superiors.
5. Where public employees have requested an opportunity to speak with the official or manager who supervises their employment, whether the official or manager has a duty to make a reasonable inquiry as to the nature of their concerns before retaliating against said employees.
6. Whether the rule that arguments not raised at the district court level are deemed waived at the appellate level applies where the argument is raised by an *appellee* in *response* to an argument substantively raised for the first time on appeal by the appellant.

PARTIES TO THE PROCEEDINGS BELOW

The parties before this Court are:

Plaintiff-Petitioner Jenny Wernsing,

**Intervening-Plaintiffs-Petitioners Charles Bingaman and
Troy Cannon, and**

Defendant-Respondent Odell Thompson, Jr.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, as none of the petitioners are non-governmental corporations.

TABLE OF CONTENTS

| | |
|--|------------|
| Questions Presented | i |
| Parties to the Proceedings Below and Rule 29.6 Statement | ii |
| Table of Contents | iii |
| Table of Authorities Cited | v |
| Introductory Statement | 1 |
| Citations of official and unofficial reports of opinions and orders entered. | 1 |
| Statement of basis for jurisdiction | 1 |
| Constitutional provisions involved | 2 |
| Statement of the case. | 2 |
| Reasons for Granting the Writ | 9 |
| I. The Seventh Circuit's decision in this case conflicts with the settled precedent of this Court <i>and</i> conflicts with settled rules of law of other Circuit Courts of Appeal on the vital matter of the free speech rights of public employees. | 9 |
| II. The Seventh Circuit committed a patent error in dismissing plaintiffs' claims seeking a declaratory judgment; it is well settled that qualified immunity does not bar claims for equitable relief. | 10 |

| | | |
|--|--|-----|
| III. | The Seventh Circuit's holding with respect to prior restraint rests on a false premise, and cannot be reconciled with the holding of this Court in <i>NTEU</i> , or settled precedent in other circuits. | 11 |
| IV. | In reversing the district court's order on plaintiff's retaliation claim, the Seventh Circuit constricted this Court's holdings in <i>Waters v. Churchill</i> and <i>Givhan v. Western Line Consolidated School District</i> | 18 |
| V. | The Seventh Circuit erred in applying the waiver rule to an <i>appellee</i> who is <i>responding</i> to an argument substantively raised for the first time in an interlocutory appeal by the appellant. | 21 |
| Conclusion | | 25 |
| Appendix | | |
| Appendix A Order on Petition for Rehearing - October 25, 2005 . | | 1a |
| Appendix B Seventh Circuit Opinion - September 9, 2005 . . . | | 2a |
| Appendix C District Court Order - October 9, 2003 | | 40a |

TABLE OF AUTHORITIES**Cases**

| | |
|--|------------|
| <i>Bew v. City of Chicago</i> , 252 F.3d 891 (7th Cir. 2001) | 23 |
| <i>Brown v. Bathke</i> , 566 F.2d 588, 593 (8th Cir. 1977) | 11 |
| <i>Brown v. Glines</i> , 444 U.S. 348, 62 L. Ed. 2d 540, 100 S. Ct. 594 (1980) | 15, 16, 17 |
| <i>Burgess v. Lowery</i> , 201 F.3d 942, 944 (7th Cir. 2000) | 11 |
| <i>Crue v. Aiken</i> , 370 F.3d 668 (7th Cir. 2004) | 12 |
| <i>Czurbanis v. Albanee</i> , 721 F.2d 98, 105 (3rd Cir. 1983) | 20 |
| <i>Denius v. Dunlap</i> , 209 F.3d 944, 959 (7th Cir. 2000) | 11 |
| <i>Eberhardt v. O'Malley</i> , 17 F.3d 1023 (7th Cir. 1994) | 11 |
| <i>Givhan v. Western Line Consolidated School District</i> , 439 U.S. 410, 99 S. Ct. 693 (1979) | 18, 20 |
| <i>Harman v. New York</i> , 140 F.3d 111 (2nd Cir. 1998) | 17 |
| <i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) | 10, 11 |
| <i>Kessler v. Providence</i> , 167 F. Supp.2d 482 (D. Rhode Island 2001) | 11 |
| <i>Knox v. McGinnis</i> , 998 F.2d 1405 (7th Cir. 1993) | 11 |

| | |
|--|---------------|
| <i>Latino Officers Ass'n v. City of New York,</i> 196 F.3d 458 (2nd Cir. 1999) | 16 |
| <i>Muller by Muller v. Jefferson Lighthouse Sch.,</i> 98 F.3d 1530 (7th Cir. 1996) | 15, 16 |
| <i>Pickering v. Board of Ed. of Township High School Dist.</i> 205, Will Cry., 391 U.S. 563, 88 S. Ct. 1731 (1968) | 14, 15 |
| <i>Premcor USA, Inc. v. Am. Home Assurance Co.,</i> 400 F.3d 523 (7th Cir. 2005) | 22 |
| <i>Schering Corp. v. Illinois Antibiotics Co.,</i> 89 F.3d 357 (7th Cir. 1996) | 22-23 |
| <i>Snepp v. United States</i> , 444 U.S. 507, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980) | 15, 16, 17 |
| <i>Swartzwelder v. McNeilly,</i> 297 F.3d 228 (3rd Cir. 2002) | 16 |
| <i>Transamerica Insurance Co. v. South,</i> 125 F.3d 392 (7th Cir. 1997) | 23 |
| <i>Tukcer v. Department of Education,</i> 97 F.3d 1204 (9th Cir. 1996) | 17 |
| <i>United States v. Nat'l Treasury Employees Union,</i> 513 U.S. 454 (1995). | 8, 10, 12 |
| <i>Waters v. Churchill</i> , 977 F.2d 1114 (1992) | 18 |
| <i>Waters v. Churchill</i> , 511 U.S. 661 (1994) | 8, 10, 18, 19 |

| | |
|--|---------------|
| <i>Wernsing v. Thompson,</i> 423 F.3d 732 (7th Circuit 2005) | <i>passim</i> |
| <i>Wernsing v. Thompson,</i> 286 F.Supp. 2d 983 (C.D. Ill. 2003) | 6, 8, 12, 21 |
| <i>Williams v. REP Corp.</i> , 302 F.3d 660 (7th Cir. 2002) . . | 22 |
| <i>Wood v. Strickland</i> , 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) | 10, 11 |
| <i>Yee v. City of Escondido</i> , 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992) | 23 |
| <i>Zook v. Brown</i> , 748 F.2d 1161 (7th Cir. 1984) | 15 |
| <i>Zook v. Brown</i> , 865 F.2d 887 (7th Cir. 1989) | 15 |
| Statutes | |
| 28 U.S.C. § 1254(1) | 1 |
| 42 U.S.C. §§ 1983 and 1988 | 1 |
| 28 U.S.C. §§ 1331 and 1343 (a)(3) | 2 |
| Constitutional Provisions | |
| United States Constitution, Amend. I. | <i>passim</i> |
| United States Constitution, Amend. XIV | 5 |
| United States Constitution, Amend. V | 23 |
| Supreme Court Rules | |
| Sup. Ct. R. 10 | 10 |

INTRODUCTORY STATEMENT

Petitioners Jenny Wernsing, Charles Bingaman and Troy Cannon hereby petition this court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 423 F. 3d 732 (7th Circuit 2005). The Order denying the Petitions for Rehearing and Rehearing En Banc is reported at 2005 U.S. App. LEXIS 23342 (7th Cir. Ill., Oct. 25, 2005). The Order of the United States District Court for the Central District of Illinois that granted Plaintiff's and Intervening Plaintiffs' Motion for Partial Summary Judgment, and that granted in part and denied in part Defendant's Motion for Summary Judgment, is reported at 286 F. Supp. 2d 983 (C.D. Ill. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 9, 2005. The Order of the United States Court of Appeals for the Seventh Circuit denying Plaintiff's and Intervening Plaintiffs' Petition for Rehearing and Rehearing En Banc was entered on October 25, 2005. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Basis for jurisdiction in the district court: The claims at issue in this cause were brought pursuant to 42 U.S.C. §§ 1983 and 1988 and the First Amendment to the United States Constitution. The basis for jurisdiction was 28 U.S.C. §§ 1331 and 1343 (a)(3) and the aforesaid statutory provisions.

The plaintiffs, Petitioners herein, served as Internal Security Investigators II (ISI 2s) in the Office of the Inspector General (OIG) in the Illinois Department of Human Services (DHS). The OIG is responsible for investigating reports of abuse and neglect of the mentally ill and developmentally disabled persons who receive DHS services. It is undisputed in this case that the work of ISI 2s is vitally important to the welfare of some of the most vulnerable members of society and naturally touches on matters of the gravest public concern. All ISI 2s report to a designated Team Leader, who reports to the appropriate Bureau Chief, who in turn reports to the Deputy Inspector General or the Inspector General. The Inspector General, in turn, reports to the Secretary who heads DHS.

Defendant Odell Thompson, Jr. became the Inspector General of the DHS on July 1, 2000. On or about November 27, 2000, Thompson received an e-mail from five employees in the OIG's Southern Bureau, including plaintiffs Wernsing, Bingaman and Cannon, which stated:

Several investigators in the Southern Bureau have some concerns we wish to discuss with you as soon as possible. These concerns are relative as to who we understand you are going to appoint as the Southern Bureau Chief. These concerns are very important and need your attention before any appointment is made.

Defendant received the e-mail but did not respond to it. On November 30, 2000, Thompson received another e-mail from the same five employees, stating in relevant part:

We contacted you on 11/27/00 asking that you meet with us and discuss our serious concerns over who we understand to be the tentative selection for Bureau Chief. We have not heard from you. We once again ask that you meet with us. We would like if at all possible to keep this matter in house out of respect for the chain of command and in keeping with respect for your position. However, if we are not afforded this opportunity we will feel compelled to air our concerns to the Secretary [i.e., the head of DHS] or those at the legislative level.

Again, defendant did not respond to the request for a meeting and made no inquiries into the basis for the e-mail. The "concerns" referenced in the two e-mails stemmed from information indicating that defendant was going to appoint Ron Fuentes as Bureau Chief of the OIG Southern Bureau. Each of the plaintiffs had worked with Fuentes when he had

previously served as Bureau Chief, and they had concerns about his ability to manage the Bureau arising from that experience. They alleged that Fuentes' lack of competence as a manager had caused a large backlog of investigations, staffing shortages and delays in OIG investigations, including an extreme delay in a case involving the death of a patient. The backlog in investigations was particularly troubling, since any delay in investigating cases of neglect or abuse could compromise the investigators' ability to gather information or could render grievances against offending DHS employees time-barred under Illinois law.

On or about December 5, 2000, Defendant sent a letter to the five e-mail signatories that stated, in relevant part:

The Office of Inspector General staff are not authorized to communicate about Office of Inspector General policies or operations directly to the Secretary [head of the DHS], to the press, or to any external agent except with my prior knowledge and approval.

This directive was repeated in a second communication sent to *all* employees in the OIG in January, 2001. Defendant later testified that there was nothing other than the two e-mails from the plaintiffs that led him to issue the December 5 directive and that his concern was that he "didn't want to be sabotaged in some way" because he "just didn't know what their motives were." He admitted that he didn't make any effort to ascertain what those motives were. It is undisputed that the release of confidential information by OIG employees and contacts with the press were already governed by both statute and internal DHS rules.

In March 2001, Thompson attended a meeting of the Southern Bureau staff where he finally met with the plaintiffs

and the other e-mail signatories face-to-face, at which time, the latter informed him of their concerns regarding Fuentes.

Plaintiffs allege that, on the heels of these e-mail exchanges, Defendant committed several acts of retaliation for their inquiries and requests for a meeting. These included denial of overtime pay and mileage to Wernsing and Bingaman after requests for the same had been approved by their immediate supervisor and the Bureau Chief, the downgrading of Wernsing and Bingaman's annual performance evaluations (which affected their salary increases), the denial of Bingaman's application for the position of Southern Bureau Chief, denial of appropriate and customary travel and lodging expenses for both Wernsing and Bingaman on different occasions and denial of a pre-approved salary increase for the time Bingaman served as acting Investigative Team Leader.

Plaintiffs also alleged that, due to defendant's directives prohibiting unapproved discussion of OIG business with any "external agent," or the Secretary of DHS, they felt compelled to restrict their communications with individuals outside the OIG.

On August 3, 2001, Plaintiff Wernsing brought the present suit alleging that defendant's December 5, 2000 and January 2001 directives constituted an unlawful prior restraint on speech that violated her First and Fourteenth Amendment rights. The complaint sought declaratory and injunctive relief as well as damages. Plaintiffs Bingaman and Cannon filed a complaint in intervention over the same issues and added a claim that defendant impermissibly retaliated against them for exercising their First Amendment rights. Their complaint also sought declaratory and injunctive relief as well as damages. In January 2003, Plaintiff Wernsing amended her complaint to add a retaliation claim.

The plaintiffs also named OIG Deputy Inspector General, Sydney Roberts, as a defendant in the suit. While the suit was pending, defendant's tenure as Inspector General ended, and he was succeeded by Roberts. Upon assuming the post of Inspector General, Roberts submitted an affidavit to the district court averring that she had "taken no action as to any employee based on the [directives], and that she does "not consider the . . . directives to be the official policy of the Office of the Inspector General." Plaintiff Wernsing, however, submitted an affidavit stating that she had never been notified that the directive was no longer the official policy of the OIG.

After discovery, the plaintiffs filed a motion for partial summary judgment, arguing that they were entitled to judgment as a matter of law on their prior restraint claims. Defendant responded with his own motion for summary judgment, seeking judgment as a matter of law on both the prior restraint claim and the retaliation claim, raising the defense of qualified immunity as to each. Then-defendant Roberts sought to be dismissed from the suit.

In October 2003, the district court granted the plaintiffs' motion for summary judgment on the prior restraint claim, holding that defendant's directives constituted a prior restraint on plaintiffs' constitutionally protected speech, defendant's interest in preventing the speech did not outweigh plaintiffs' interest in commenting on matters of public concern and plaintiffs were not policymaking or confidential employees. *Wernsing v. Thompson*, 286 F.Supp. 2d 983, 992-997 (C.D. Ill. 2003). The court denied defendant's motion for summary judgment on the retaliation claim, holding that material questions of fact remained as to whether plaintiffs' constitutionally protected speech was a motivating factor in defendant's alleged retaliatory acts against them. *Id.* at 997-999.

The district court also rejected defendant's claim of qualified immunity, holding that it was clearly established that his alleged actions restricting or retaliating against plaintiffs' speech on matters of public concern violated plaintiffs' constitutional rights. *Id.* at 999-1001. However, the district court did grant defendant's motion for summary judgment with respect to plaintiffs' request for injunctive relief, holding that there was no substantial likelihood that successor Inspector General Sydney Roberts would enforce defendant's directives. *Id.* at 1001-1002. The court dismissed Roberts as a defendant in the case. *Id.*

Defendant appealed to the U.S. Court of Appeals for the Seventh Circuit , on the grounds that the district court's order denying defendant's motion for summary judgment on qualified immunity grounds was an immediately appealable "final decision" within the meaning of 28 U.S.C. § 1291. The Court of Appeals found that it had jurisdiction on that ground. *Wernsing v. Thompson*, 423 F. 3d 732, 741 (7th Circuit 2005). It reversed the ruling of the district court with respect to all claims favoring plaintiffs. Specifically, it held that Plaintiffs' claims for injunctive relief had been rendered moot by Sydney Roberts' apparent abandonment of defendant's pre-clearance directives - although it specified that "plaintiffs' claims for monetary damages and declaratory relief still present a live case or controversy." *Id.* at 745-746.

With respect to the prior restraint claims, the Court held that defendant was entitled to qualified immunity, because it was not yet "clearly established," as of December 5, 2000, that his pre-clearance directives constituted an unlawful prior restraint on speech. *Id.* at 747-750. In that regard, the Court distinguished the case *sub judice* from the opinion of this Court in *United States v. Nat'l Treasury Employees Union* 513 U.S. 454 (1995) ("NTEU"), on the ground that "the

prerogatives of a government supervisor in managing the communications of his own staff are far less clear" than was set forth in *NTEU*; adding that the instant matter concerned a "relatively informal supervisory directive aimed at close subordinates." *Id.* at 748.¹

Finally, the Court held that plaintiffs' retaliation claims failed because the initial speech in question – the November 27 and November 30, 2000 e-mail messages transmitted to defendant – was too vague to be deemed "speech on a matter of public concern." *Id.* at 752-754. In reaching that conclusion, the Court rejected plaintiffs' argument that their meeting with defendant in March 2001, where they articulated their specific concerns regarding Fuentes' possible appointment as Southern Bureau chief, provided an alternative basis for their retaliation claim. The Court held that, since that argument was not presented to the district court, it was waived. *Id.* at 751. The Court also rejected plaintiff's argument that *Waters v. Churchill*, 511 U.S. 661, 677-78 (1994) established a "duty, before retaliating, to reasonably inquire as to the nature of the concerns which Plaintiffs asked

¹ In this regard, the Court of Appeals was evidently laboring under a false factual premise. On page 743, note 3 of its opinion, it makes reference to an "internal e-mail" and an "e-mail directive" as being the means by which defendant's pre-clearance directives were issued to plaintiffs. *This is a plain error of fact.* It was plaintiffs who raised their initial concerns by e-mail. Defendant's December 5, 2000 directive was sent by letter, the receipt of which plaintiffs were required to acknowledge, and his January 2000 directive was included in an internal departmental newsletter. The record on appeal will verify this; the District Court's opinion does make clear that the former directive was sent by "letter" and the latter was "sent to all employees" in the OIG. *Wernsing*, 286 F.Supp. 2d at 990.

to express," holding that "*Waters* stands for no such proposition." *Id.* at 753.

On these grounds, the Court of Appeals reversed and remanded the case, "with instructions to grant Thompson summary judgment with respect to *all* claims on grounds of qualified immunity." *Id.* at 754 (emphasis added). It provided no rationale as to why plaintiffs' claims seeking a declaratory judgment should be denied on grounds of qualified immunity or any other ground.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's decision in this case conflicts with the settled precedent of this Court *and* conflicts with settled rules of law of other Circuit Courts of Appeal on the vital matter of the free speech rights of public employees.

Supreme Court Rule 10 instructs all petitioners to this Court that the potentially compelling reasons for granting a writ include those where a United States court of appeals' decision conflicts with "the decision of another United States court of appeals decision on the same important matter," or where it "conflicts with relevant decisions of this Court." Sup. Ct. R. 10. As is more fully explicated in the more specific arguments set forth in sections II - V, *infra*, the Seventh Circuit's decision in this case meets *both* of these vital criteria. Few "matters" could be more "important" than the rights of public employees to exercise free speech under the First Amendment. Few decisions of this Court could be more "relevant" to the exercise of those rights than the crucial protections afforded by such decisions as *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 130 L. Ed.

2d 964, 115 S. Ct. 1003 (1995) and *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878 (1994).

II. The Seventh Circuit committed a patent error in dismissing plaintiffs' claims seeking a declaratory judgment; it is well settled that qualified immunity does not bar claims for equitable relief.

The Court of Appeals did not directly address plaintiffs' claims for declaratory relief, except in correctly acknowledging that they had not been rendered moot. *Wernsing*, 423 F. 3d at 746. Yet it proceeded to issue an order granting defendant summary judgment "with respect to *all* claims on grounds of qualified immunity." *Id.* at 754 (emphasis added). This flies in the face of settled precedent that the doctrine of qualified immunity does not apply to claims for equitable relief.

This Court's landmark ruling on qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), held that government officials "are shielded from liability for *civil damages* insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (emphasis added). Implicit in this holding was the proposition that claims for equitable relief were excluded from the scope of such protection, as, indeed, this Court had indicated previously. See *Wood v. Strickland*, 420 U.S. 308, 314 n.6, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) (stating that "immunity from damages does not ordinarily bar equitable relief as well").

The rule that qualified immunity does not shield public officials from claims for equitable relief has even been considered axiomatic by the Seventh Circuit itself. See, e.g.,

Denius v. Dunlap, 209 F.3d 944, 959 (7th Cir. 2000); *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994); *Knox v. McGinnis*, 998 F.2d 1405, 1412-1413 (7th Cir. 1993). Thus plaintiffs need not dwell on this argument; it is glaringly evident that Seventh Circuit in this case regrettably and simply – but the unmistakably – blundered. The most elementary considerations of justice dictate that plaintiffs not be deprived of all avenues of relief because of such an oversight.

The alternative, highly improbable explanation – that the Court of Appeals below sought to carve out new ground for the doctrine of qualified immunity via a conscious omission – would warrant an emphatic message from this Court, considering that such a new rule runs contrary to *Harlow* and *Strickland*, and would plainly create a split in the circuits as well. See, e.g., *Brown v. Bathke*, 566 F.2d 588, 593 (8th Cir. 1977); *Kessler v. Providence*, 167 F. Supp.2d 482, 490-491 (D. Rhode Island 2001).

II. The Seventh Circuit's holding with respect to prior restraint rests on a false premise, and cannot be reconciled with the holding of this Court in *NTEU*, or settled precedent in other circuits.

The Court of Appeals held that defendant was entitled to qualified immunity because “it was not clearly established, at the time the pre-clearance directive was first issued (December 5, 2000) that such a directive constituted an unlawful prior restraint on speech.” *Wernsing*, 423 F. 3d at 747-750. It came to that conclusion by distinguishing the “formal statutory bans of certain speech activity by government employees,” at issue in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (“*NTEU*”), with what it characterized, in the

instant case, as "the prerogatives of a government supervisor in managing the communications of his own staff" and a "relatively informal supervisory directive aimed at close subordinates." *Wernsing*, 423 F. 3d at 748.

The Court's holding: a) rests on a false premise, b) cannot be squared with *NTEU*, and c) has resulted in a clear split in the circuits. As to the false premise, the characterization of defendant's directives as being limited to "his own staff" and "relatively informal" are incorrect. The Court referred to an "internal e-mail" and an "e-mail directive" as being the means by which defendant's pre-clearance directives were issued to plaintiffs. *Id.* at 743 n. 3. This is a plain error of fact. It was plaintiffs who raised their initial concerns by e-mail. Defendant's December 5, 2000 directive was sent by letter, the receipt of which plaintiffs were required to acknowledge, and his January 2000 directive was included in an internal departmental newsletter. The record on appeal will verify this; the District Court's opinion does make clear that the former directive was sent by "letter" and the latter was "sent to all employees" within OIG. *Wernsing*, 286 F.Supp. 2d at 990.

That the Court of Appeals was laboring under a misapprehension of fact is further supported by its attempt to distinguish its own precedent in *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (upholding denial of qualified immunity protection to university chancellor who issued pre-clearance directive restricting speech aimed at prospective student athletes). In the case at bar, the Court stated: "The e-mail directive at issue in *Crue*, issued by the president [sic] of the University of Illinois, applied not just to the president's own staff or other University employees, but to all University

students and all ‘others associated with the University.’ 370 F.3d at 674-75.” *Wernsing*, 423 F. 3d at 748 n. 8.²

Thus, the Court of Appeals apparently believed that there was an “e-mail directive at issue” in the instant matter, but that the “e-mail directive” in *Crue* was distinguishable because of the broad classes of persons covered. This is erroneous on both counts: The directives at issue in the instant case were not “informal” but were formalized edicts spelled out in print, not e-mail. They were directed, not only at plaintiffs but at *all* employees of the OIG – a department, that, by defendant’s own reckoning, encompassed “about 31 ISI 2s, four to six team leaders, four bureau chiefs and one Deputy Inspector General.” (Defendant’s Appellant’s Brief in Court below, at 6, citing to record Doc. 57 at 6.)

The Seventh Circuit’s opinion cannot be squared with, and erroneously narrows the breadth of First Amendment protections established by this Court in, *NTEU*. In its efforts to distinguish *NTEU*, the Court of Appeals maintained: “That case involved a formal statutory ban prohibiting unconditionally the receipt of honoraria by *all* government employees. Such a sweeping legal enactment is clearly distinct from the kind of informal, internal directive at issue here.” *Wernsing*, 423 F. 3d at 750 n. 10.

Apart from the facts that defendant was a departmental director, not a mere “supervisor,” and that his directives were both formal and sweeping, this misapprehends *NTEU*’s rationale. In *NTEU*, this Court did indeed make note of the

² The panel in the case at bar essentially admitted that its own view of qualified immunity was at odds with that of the panel in *Crue*. *Id.* at 750 n. 9

widespread impact of the honoraria ban" at issue in that case, citing the number of federal employees affected, and observing that it "gave rise to far more serious consequences than a single supervisory decision." *NTEU*, 513 U.S. at 468. It then stated that this was *one* of the "reasons" why "the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action" — the other reason being that it was a "ban" that "chills speech before it happens." *Id.*

Read in context, the reference to a "single supervisory decision" was plainly intended to contrast the enormity of the prior restraint at issue in the case with the usual *post hoc* acts of suppression of speech that the Court had dealt with in "*Pickering* and its progeny." *Id.* at 466-67, citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S. Ct. 1731 (1968). The passage in question follows the sentence: "We normally accord a stronger presumption of validity to a congressional judgment than to an individual executive's *disciplinary action*." *Id.* at 468 (emphasis added). Thus, the Court was not contrasting the Act of Congress at issue in *NTEU* with a *prior restraint* issued by a "supervisor"; it was contrasting a prior restraint enacted by Congress with the more typical *post hoc* acts of suppression by supervisors.

Indisputably, the number of employees affected by defendant's edict in the case *sub judice* are considerably less than the number of employees affected by the ban in *NTEU*, viz., the entirety of the federal government. *NTEU*, 513 U.S. at 457. However, the Court in *NTEU* neither stated nor implied that employees of small government agencies enjoy less protection under the First Amendment than employees of large or multiple government agencies, and it would require a strained interpretation of that opinion and a departure from

common sense to reach that conclusion. Nor did the Court state or imply that it was the *formality* of the Congressional act, *per se*, that distinguished it from a supervisory-imposed act of suppression. Rather, what plainly concerned the Court above all was the *scope* of the ban in terms of the quantum of *speech* affected: "The honoraria ban as applied to respondents burdens speech far more than our past applications of *Pickering* because the ban deters an enormous quantity of *speech* before it is uttered, based only on speculation that the speech might threaten the Government's interests." *NTEU*, 513 U.S. at 467 (emphasis added).

The Court also gave considerable weight to the impact of the ban on "the *public's* right to read and hear what the employees would otherwise have written and said." *Id.* at 470 (emphasis added). This consideration appears to have escaped the Seventh Circuit's notice altogether – in a case in which the plaintiffs sought to raise matters that affected the lives, health and safety of some of the most vulnerable members of society.

The Court of Appeals attempted to support its conclusion that the law on sweeping prior restraints such as those imposed by defendant was not "clearly established" at the time by citing to certain cases in which it, and this Court, had "approved similar pre-clearance screening directives," *Wernsing*, 423 F. 3d at 748-749 – specifically citing to *Zook v. Brown*, 865 F.2d 887, 891-92 (7th Cir. 1989) (*Zook II*); *Zook v. Brown*, 748 F.2d 1161, 1165 (7th Cir. 1984) (*Zook I*); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996); *Brown v. Glines*, 444 U.S. 348, 62 L. Ed. 2d 540, 100 S. Ct. 594 (1980); and *Snepp v. United States*, 444 U.S. 507, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980). Notably, all but one of these cases were decided *prior* to *NTEU*, and thus are essentially irrelevant to a determination of what was "clearly established" in the law as of December

5, 2000. The one exception – *Muller* – was not even an employment case but “upheld elementary school rules requiring students to obtain prior approval of the school principal before distributing private handbills.” *Wernsing*, 423 F. 3d at 748.

Both in its conclusions as to *NTEU* and in its reliance on such cases as *Snepp* and *Glines*, the Seventh Circuit has now created a split in the circuits on the issue of whether the law was “clearly established” that sweeping prior restraints on speech, requiring even a small class of public employees to obtain advance permission before speaking to the media, “any external agent,” or a higher-level supervisor, *Wernsing*, 423 F. 3d at 738, violate the First Amendment. For example, in *Swartzwelder v. McNeilly*, 297 F.3d 228 (3rd Cir. 2002), a Pittsburgh police officer challenged a departmental policy barring officers from providing opinion testimony in any criminal or civil proceeding without prior authorization from the Chief of Police. *Id.* at 232. The defendant City raised an argument similar to the rationale adopted by the Seventh Circuit in the case at bar, viz., that, in contrast to *NTEU*, the directive at issue “applies only to . . . the employees of a single city department.” The Third Circuit emphatically rejected the argument, holding that “nothing in *NTEU* implies that the stricter standard applies only when a ‘vast group’ of employees is involved” *Id.* at 237. It in turn cited to the Second Circuit’s similar assessment in *Latino Officers Ass’n v. City of New York*, 196 F.3d 458, 463 (2nd Cir. 1999).

In passing, the Third Circuit also distinguished *Snepp* on the grounds that the City’s directive – like the directive in the case at bar – was not limited to preventing the disclosure of confidential information. *Swartzwelder*, 297 F.3d at 239.

In *Harman v. New York*, 140 F.3d 111 (2nd Cir. 1998), the Second Circuit also distinguished *Snepp* and *Glines*, in giving a broader construction to *NTEU* than the Seventh Circuit. In *Harman*, New York City's child welfare caseworkers, like plaintiffs in the instant matter, investigated allegations of abuse and neglect, and had a legal duty to protect the confidentiality of their clients. *Id.* at 115. Like defendant in the instant matter, the City agency that administered child welfare programs attempted to use this duty as a justification for a broad directive, requiring prior clearance for "[all] contacts with the media regarding any policies or activities of the Agency." *Id.* at 116. After determining that *NTEU* was applicable to a city agency directive, *id.* at 118, the Second Circuit rejected the City's reliance on *Snepp* and *Glines*, on the ground that those cases "concerned materials 'essential to the security of the United States and - in a sense - the free world.'" *Id.* at 122, citing *Snepp*, 444 U.S. at 512 n.7. It also distinguished the City's directive from that in *Snepp* on the ground that the City (like defendant herein), "has not demonstrated that the asserted harms are real, rather than conjectural." *Id.* at 123.

With respect to a split in the circuits, this Court should also consider *Tucker v. Department of Education*, 97 F.3d 1204 (9th Cir. 1996) (citing to *NTEU* in striking down broad prohibition on distribution of religious materials by California Department of Education). *Harman* and *Tucker* were both decided well before December 5, 2000, further undermining the Seventh Circuit's conclusion that the law on this subject was not "clearly established" at that time.

IV. In reversing the district court's order on plaintiff's retaliation claim, the Seventh Circuit constricted this Court's holdings in *Waters v. Churchill* and *Givhan v. Western Line Consolidated School District*.

In *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878 (1994), this Court addressed the duty of a public employer supervisor or administrator to ascertain the facts about an employee's speech before it engages in retaliatory action. The plurality opinion rejected the Seventh Circuit's prior opinion that "the inquiry must turn on what the speech actually was, not on what the employer thought it was," *id.* at 667, citing *Waters v. Churchill*, 977 F.2d 1114, 1127 (1992), as that "would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court." *Waters*, 511 U.S. at 676. The plurality concluded, however, that public employer supervisors do have to use "the care a reasonable manager would use before making an employment decision . . ." 511 U.S. at 678. Such care is "necessary" to avoid "the possibility of inadvertently punishing someone for exercising her First Amendment rights." *Id.*

In reaching that conclusion the plurality made clear that, where there was doubt as to what an employee actually stated, this duty of reasonable care imposed a concomitant duty to make a reasonable inquiry into the facts. It cited, as an example of an *unreasonable* response, the instance of "an employee . . . accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what is said based on unreliable hearsay." *Id.* at 677. Justice Souter's concurring opinion read the plurality opinion in the same way: "I add these words to emphasize that, in order to avoid liability, the public employer must *not only reasonably investigate* the third-party report, but must also

actually believe it." *Id.* at 682-683 (Souter, J., concurring)(emphasis added).

In the case at bar, plaintiffs, in their e-mails to defendant, expressed "concerns over who we understand to be the tentative selection for Bureau Chief." *Wernsing*, 423 F. 3d at 738. Plaintiffs argued in the Court below that *Waters* imposed a duty on defendant to make a reasonable inquiry to learn what plaintiffs' "concerns" were, before retaliating; conversely, that it was patently unreasonable for him to retaliate on the basis of employees expressing such "concerns." In sharp contrast to its earlier opinion in *Waters*, the Seventh Circuit here embraced the opposite extreme, narrowing the duty *Waters* imposes on government supervisors to make a reasonable investigation to circumstances in which, literally, "the content of the speech at issue" or "the identity of the relevant speakers" is in doubt "before disciplining their employees for expressive activity." *Wernsing*, 423 F. 3d at 753. The Court then dismissed the applicability of *Waters*, stating that, since "there was no erroneous or unreasonable belief about what plaintiffs said" (only what the underlying concerns were), *Waters* was inapposite. *Wernsing*, 423 F. 3d at 753.

To put it mildly, this gives short shrift to the larger concern that prompted the plurality, and Justice Souter, in *Waters* to adopt the "reasonable manager" rule: "the possibility of inadvertently punishing someone for exercising her First Amendment rights." *Waters*, 511 U.S. at 678.

Here, defendant restrained speech and further retaliated without knowing or bothering to make *any* inquiry as to the underlying substance of plaintiffs' stated concerns. *Wernsing*, 423 F. 3d at 738. Instead (it must be presumed, given the procedural posture of this case), he restrained speech and

retaliated because they dared to request a meeting with him at which they *would* more fully express those concerns. The end result was that defendant restrained plaintiffs' speech and punished them for *trying* to express matters of public concern. The failure to act as a reasonable manager would, and make a reasonable inquiry before restraining speech, led to retaliation for an *attempted* exercise of protected speech.

The consequences of the Seventh Circuit's departure from *Waters* are grave indeed. If allowed to stand, a public employee who communicates *any* message to a supervisor that does not, in itself, clearly articulate a matter of public concern – even a simple, “I request a time to meet with you” – has just given that supervisor a license to retaliate, with no recourse to the First Amendment whatsoever.

The Seventh Circuit's opinion also conflicts with this Court's admonition in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693 (1979), that the First Amendment's protections extend to “the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.” 439 U.S. at 415-416. Here, ironically, plaintiffs initially sought to do the very thing that defendant later ordered them to do – bring their issues to him before going outside the OIG – and they were retaliated against for it. The rule in *Givhan* makes such retaliation unconstitutional.

Relatedly, that defendant sought to bar plaintiffs from speaking, not only to the media and any “external agent,” without prior approval, but also to *his* superior, the Secretary of DHS, not only offends the legal principle underlying *Givhan*; it offends sound public policy for obvious reasons and creates yet another conflict with other circuits. See, e.g., *Czurbanis v. Albanee*, 721 F.2d 98, 105 (3rd Cir. 1983)

(holding that chain of command policy which requires employee to first raise issue with the responsible county official prior to addressing county board "is incompatible with the principles that underlie the first Amendment").

V. The Seventh Circuit erred in applying the waiver rule to an *appellee* who is *responding* to an argument substantively raised for the first time in an interlocutory appeal by the appellant.

As the record on appeal will establish, defendant, in his Motion for Summary Judgment, did not raise the point that the e-mails at issue in this case failed to give him notice of the nature of the plaintiffs' concerns. (Record on Appeal, Doc. 43.) His supporting Memorandum made only one passing mention that the e-mails themselves failed to convey a "message of public concern"; it was not central to his argument. (Record on Appeal, Doc. 48 at 15.) Thus, plaintiffs did not address it in their responses to defendant's motion.

In ruling on the motion, the district court did not give the slightest indication that it considered the vagueness of plaintiffs' e-mails to be an "argument" substantively raised by defendant. *Wernsing v. Thompson*, 286 F.Supp. 2d 983 (C.D. Ill. 2003). It did acknowledge that the e-mails themselves were "vague," but analyzed plaintiffs' prior restraint claims in light of the *underlying* issue of public concern, noting that the e-mails "can reasonably be read to *support* Plaintiffs' asserted public purpose in speaking." *Id.* at 994 (emphasis added).

It was not until *his* interlocutory appeal on the qualified immunity issue that defendant first presented a substantive *argument* that, because the e-mails themselves did not specify the substance of plaintiffs' concerns, they did not sufficiently apprise defendant that they were raising a matter of public

concern, and therefore fell within a category of cases in which the speech at issue was too vague. Thus, it was only in the context of the appeal that plaintiffs responded by pointing out that most of the acts of retaliation followed the March 2001 meeting in which they more fully informed defendant of the nature of their concerns about Ron Fuentes – which irrefutably put defendant on notice that they wished to discuss matters of public concern.

The panel responded to this argument by holding that this argument was waived: “Since the plaintiffs did not advance their speech at the March 2001 meeting as a basis for their retaliation claim before the district court, they have waived any argument based on this speech. *See Premcor USA, Inc. V. Am. Home Assurance Co.*, 400 F.3d 523, 530 (7th Cir. 2005) . . . *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002)” *Wernsing*, 423 F. 3d at 751.

That arguments not raised at the district court level are ordinarily considered waived at the appellate level is a familiar and oft-cited rule. However, it is a rule that has almost universally been applied to *appellants* who try to raise new arguments – as was the case in both *Premcor* and *Williams*.

Although plaintiffs’ research to date has not disclosed any rule of law that is *precisely* on point, the application of the rule to an *appellee* would seem to fall afoul of the rule of law that

“T]he failure of an *appellee* to have raised all possible alternative grounds for affirming the district court’s original decision, unlike an appellant’s failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmation is a privilege rather than a duty.” *Schering*

Corp. v. Illinois Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996) (emphasis added).

Transamerica Insurance Co. v. South, 125 F.3d 392, 399 (7th Cir. 1997).

It is not reasonable to impose on a *non-movant* for summary judgment the burden of anticipating and responding to every conceivable argument that *might* be raised by the movant. Since the argument regarding the insufficiently informative character of the e-mails was barely mentioned, *en passant*, by defendant at the district court level, it is not reasonable to deem plaintiffs to have “waived” an argument that they had *no occasion to raise* at the district court level.

The Court of Appeal’s holding on this score is at odds with the rule quoted above in *Transamerica*. See also *Bew v. City of Chicago*, 252 F.3d 891, 895 (7th Cir. 2001) (“when a new argument supports a claim before the District Court, we will usually address it.”). It also apparently conflicts with the rule set forth by this Court – with respect to “new arguments” raised for the first time on a petition for certiorari – in *Yee v. City of Escondido*, 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992).

In that case, where the petitioners had raised a Fifth Amendment takings claim in the courts below, but where it was unclear whether they were advancing a physical takings claim or a regulatory takings claim, the respondents sought to bar the latter, arguing that it had not been properly presented in the courts below and was therefore waived. 503 U.S. at 534. While this Court ultimately declined to consider the regulatory takings claim, because it had not been presented in the *petition for certiorari* itself, *id.* at 535-538, it *rejected* the argument that the issue had been waived by the petitioners in the court below, holding that, “Once a federal claim is

properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. It pointed out that there is a vital distinction between "separate *claims*" and "separate arguments in support of a *single* claim," (emphasis in original), and concluded that, since petitioners had raised the *claim* in the courts below, "they could have formulated any argument they liked in support of that claim here." *Id.*

It should follow from this, especially considering the procedural posture of this case, that plaintiffs should have been afforded an opportunity to present "any argument they liked" in support of their First Amendment retaliation claims, when responding to what was *defendant's* new argument, in support of *its* motion for summary judgment, on an interlocutory appeal that was predicated on the narrow grounds of qualified immunity.

CONCLUSION

For the foregoing reasons, the petitioners Jenny Wernsing, Charles Bingaman and Troy Cannon urge that this petition for a writ of certiorari be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3956

[Filed October 25, 2005]

| | |
|----------------------------------|---|
| JENNY WENSING, CHARLES BINGAMON, |) |
| and TROY CANNON, |) |
| Plaintiffs-Appellees, |) |
| |) |
| v. |) |
| |) |
| ODELL THOMPSON, JR., |) |
| Defendant-Appellant. |) |
| |) |

JUDGES: Before Hon. Richard D. Cudahy, Circuit Judge,
Hon. Frank H. Easterbrook, Circuit Judge, Hon.
Michael S. Kanne, Circuit Judge.

OPINION

On consideration of the petitions of both Plaintiffs-Appellees for rehearing with suggestion for rehearing *en banc* filed on September 23, 2005, all of the judges on the original panel have voted to deny rehearing and none of the active judges on the court have voted for a rehearing *en banc*.

Therefore, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3956

[Filed September 9, 2005]

| | |
|----------------------------------|---|
| JENNY WERNING, CHARLES BINGAMAN, |) |
| and TROY CANNON, |) |
| Plaintiffs-Appellees, |) |
| |) |
| v. |) |
| |) |
| ODELL THOMPSON, JR., |) |
| Defendant-Appellant. |) |
| |) |

JUDGES: Before CUDAHY, EASTERBROOK and KANNE, Circuit Judges.

OPINION

CUDAHY, *Circuit Judge*. Three Internal Security Investigators in the Office of the Inspector General of the Illinois Department of Human Services brought suit under 42 U.S.C. § 1983, alleging that the Inspector General of Illinois had (1) imposed a prior restraint on their Constitutionally protected speech and (2) retaliated against them for exercising their First Amendment rights after they voiced concern over the Inspector General's rumored plans to make a key

appointment. Plaintiffs requested both money damages and an injunction prohibiting further restrictions on their speech. Both sides moved for summary judgment. The district court ruled that (1) the plaintiffs' request for injunctive relief is moot, (2) the Inspector General's directive barring plaintiffs from speaking to any "external agent" without his permission constituted an impermissible prior restraint on speech, (3) questions of fact remained for trial as to whether plaintiffs had suffered retaliation for exercising their First Amendment rights and (4) the Inspector General is not entitled to qualified immunity as to either claim. The Inspector General now appeals, claiming that he is entitled to qualified immunity. We reverse and remand.

I. FACTUAL BACKGROUND AND DISPOSITION BELOW

While this case presents several nuanced legal questions, the underlying facts are not disputed.¹ The plaintiffs served as Internal Security Investigators II (ISI 2s) in the Office of the Inspector General (OIG) in the Illinois Department of Human Services (DHS) at all times relevant to this suit.² The OIG is responsible for investigating reports of abuse and neglect of the mentally ill and developmentally disabled persons who

¹ The facts in this section are taken primarily from the district court's opinion below. *Wernsing v. Thompson*, 286 F. Supp. 2d 983, 989-91 (C.D. Ill. 2003).

² Jenny Wernsing was hired as an ISI II in 1998, Charles Bingaman was hired in 1997, and Troy Cannon was hired in 1996. Charles Bingaman later became an OIG Team Leader in 2000, giving him additional responsibilities from time to time.

receive DHS services. According to the job description, an ISI 2

performs highly responsible, sensitive, and confidential investigative work; conducts the gathering and analysis of relevant facts and data concerning abuse and neglect investigations; completes investigations by preparing reports, summarizing investigative activities and recommends conclusions to findings.

SPECIFICALLY:

1. Conducts confidential, sensitive, and complex investigations concerning reports of abuse and neglect at State-operated facilities and community agencies; gathers data and evidence, conducts interviews, receives reports and analyzes relevant evidence concerning cases of abuse and neglect; ensures that case reports are comprehensive and accurate; takes initial statements from staff.
2. Prepares written investigative reports upon the completion of the investigative process consisting of a summary of actions taken, findings, preservations of evidence and recommendation for corrective action and/or case closure.
3. Maintains confidential files pertaining to cases under investigation; ensures the security of all pertinent information gathered during the investigatory process.
4. Recommends revisions to investigatory procedures and practices.

5. Serves as an expert witness and provides testimony in criminal and administrative hearings related to the conducting of or results of the investigation.

6. Performs other duties as required or assigned which are reasonably within the scope of the duties enumerated above.

(Doc. 38, Wernsing Dep. Exh. M8.) In the fall of 2000, the OIG was subdivided into four geographical Bureaus: the North (Chicago), the Metro (the area surrounding Chicago), the Central and the South. All ISI 2s report to a designated Team Leader, who reports to the appropriate Bureau Chief, who in turn reports to the Deputy Inspector-General or the Inspector General.

Defendant Odell Thompson, Jr. became the Inspector General of the DHS on July 1, 2000. On or about November 27, 2000, Thompson received an e-mail from five employees in the OIG's Southern Bureau, including plaintiffs Wernsing, Bingaman and Cannon, which stated:

Several investigators in the Southern Bureau have some concerns we wish to discuss with you as soon as possible. These concerns are relative as to who we understand you are going to appoint as the Southern Bureau Chief. These concerns are very important and need your attention before any appointment is made.

(Doc. 38, Wernsing Dep., Exh. 1.) Thompson received the e-mail but did not respond to it. On November 30, 2000, Thompson received another e-mail from the same five employees, stating in relevant part:

We contacted you on 11/27/00 asking that you meet with us and discuss our serious concerns over who we understand to be the tentative selection for Bureau Chief. We have not heard from you. We once again ask that you meet with us. We would like if at all possible to keep this matter in house out of respect for the chain of command and in keeping with respect for your position. However, if we are not [**6] afforded this opportunity we will feel compelled to air our concerns to the Secretary or those at the legislative level.

Again, Thompson did not respond to the request for a meeting and made no inquiries into the basis for the e-mail.

The concerns referenced in the two e-mails apparently stemmed from rumors that Thompson was going to appoint Ron Fuentes as Bureau Chief of the OIG Southern Bureau. Each of the plaintiffs had worked with Fuentes when he had previously served as Bureau Chief, and they had concerns about his ability to manage the Bureau effectively. Specifically, plaintiffs allege that Fuentes had presided over a large backlog of investigations which caused staffing shortages in the DHS and delays in OIG investigations, had misplaced OIG files which were later found in the trunk of his car, had worked short days and was on-site at the Bureau office only two days out of the week and was generally considered an incompetent and frustrating supervisor. (See Wernsing Br. at 12-14.) The backlog in investigations was particularly troubling since any delay in investigating cases of neglect or abuse could compromise the investigators' ability to gather information (since many of the victims have difficulty remembering what happened to them) or could render grievances against offending DHS employees time-barred under Illinois law.

Unaware of the specific concerns that lay behind the two e-mails, Thompson became concerned at the suggestion that the signatories might contact the Secretary of the DHS or individuals "at the legislative level." Thompson was apparently in the midst of reorganizing the OIG, and he feared that OIG employees might be trying to "sabotage" these efforts. On or about December 5, 2000, Thompson sent a letter to the five e-mail signatories that stated, in relevant part:

The Office of Inspector General staff are not authorized to communicate about Office of Inspector General policies or operations directly to the Secretary [head of the DHS], to the press, or to any external agent except with my prior knowledge and approval.

This directive was repeated in a second communication sent to all employees in the OIG in January, 2001. Thompson later testified that there was nothing other than the two e-mails from the plaintiffs that led him to issue the December 5 directive and that his concern was that he "didn't want to be sabotaged in some way" because he "just didn't know what their motives were." He admitted that he didn't make any effort to ascertain plaintiffs' motives in threatening to contact the Secretary of DHS or legislators. It is undisputed that the release of confidential information by OIG employees and contacts with the press were already governed by both statute and internal DHS rules.

Believing that these directives potentially barred her from speaking to anyone outside of the OIG, Wernsing asked her supervisor, Sandy Mott, if the directives applied to conversations she might have with her union representative, an attorney or her legislator. At Mott's suggestion, Wernsing

telephoned Thompson on January 26, 2001, and Thompson "yelled" at her, telling her she was "walking down the road to getting fired" and accusing her of "playing games." That same day, Mott sent an e-mail to the Inspector General's Office relaying Wernsing's question. Sydney Roberts, who was then serving as the Deputy Inspector General at the time, responded to Mott's e-mail with two messages. The first read simply: "Your people really want to try me don't they." The second e-mail stated:

No one in the OIG is represented by a Union that is in any sort of contractual agreement with DHS. Thus we don't have to honor anything that their union representative requests unless it is consistent with the rights all employees are entitled to by state or federal law. In other words, they follow the direction of their union representative at their own peril.

With respect to the statements made to union personnel, the courts have said that employers may regulate the speech of *certain employees in certain circumstances*. Thus, they should know the law on this matter, before discussing OIG matters with outside individuals.

(Italics in original.) On February 7, 2001, Mott then e-mailed Wernsing the following response:

In answer to your question, Deputy I.G. Sydney Roberts indicated to me that no one in the OIG is represented by a Union that has a contractual agreement with DHS. Thus, we don't have to honor anything that their union representative requests unless it is consistent with the rights all employees are entitled to by state or federal law. Further, with

respect to statements made to union personnel, the courts have said that employer may regulate the speech of certain employees in certain circumstances. Thus, you should know the law on this matter before discussing OIG matters with outside individuals.

In March 2001, Thompson attended a meeting of the Southern Bureau staff where he finally met with the plaintiffs and the other e-mail signatories face-to-face. He asked them if they had any concerns they wanted to discuss, and they told him of the rumors concerning Fuentes' imminent appointment, and of their grave concerns about Fuentes' ability to manage the Southern Bureau effectively. They cited Fuentes' work habits, the enormous backlog of cases that had occurred under his supervision and his general inability to manage the Bureau.

Plaintiffs allege that, on the heels of these e-mail exchanges, Thompson committed several acts of retaliation for their inquiries and requests for a meeting. These included: (1) Thompson's denial of overtime pay and mileage to Wernsing and Bingaman after requests for the same had been approved by their immediate supervisor and the Bureau Chief, (2) a warning to Wernsing by the Bureau Chief to watch out because Thompson was watching everything that she did, (3) the downgrading of Wernsing and Bingaman's annual performance evaluations, (4) the introduction of false and misleading evidence at Bingaman's grievance hearing, (5) denial of Bingaman's application for the position of Southern Bureau Chief, (6) denial of appropriate and customary travel and lodging expenses for both Wernsing and Bingaman on different occasions and (7) Thompson's denial of a pre-approved salary increase for the time Bingaman served as acting Investigative Team Leader. See *Wernsing*, 286 F. Supp. 2d at 997-98.

Plaintiffs also allege that, due to Thompson's directives prohibiting unapproved discussion of OIG business with any "external agent," they felt compelled to restrict their communications with individuals outside the OIG. Specifically, Wernsing testified that she refused to answer questions about OIG policies from employees at state facilities or community agencies, refrained from commenting publicly on changes to an administrative rule that altered the official definitions of abuse and neglect and refrained from commenting on an OIG proposal to delegate preliminary investigations concerning serious injuries to the local facility where the injury in question occurred. Plaintiff Cannon testified that he refrained from raising concerns with his state legislators about Thompson's qualifications as Inspector General while the State Senate was considering his appointment. However, there is also evidence that plaintiff Bingaman contacted both his local union steward and a state legislator regarding his troubles with Thompson in the months following Thompson's directives.

On August 3, 2001, Wernsing brought the present suit alleging that Thompson's pre-clearance directive constituted an unlawful prior restraint on speech that infringes on her First and Fourteenth Amendment rights. Bingaman and Cannon later filed a motion to intervene alleging that Thompson had violated their free speech rights by issuing the directive and had impermissibly retaliated against them for exercising those rights. In January 2003, Wernsing amended her complaint to add a First Amendment retaliation claim as well. Plaintiffs requested several types of relief, including an injunction barring future enforcement of Thompson's directive, declaratory relief, and money damages for humiliation, stress and emotional anguish resulting from the imposition of the directive, as well as for losses stemming from Thompson's alleged reprisals against them.

The plaintiffs also named Thompson's Deputy Inspector General, Sydney Roberts, as a defendant in the suit. While the suit was pending, Thompson's tenure as Inspector General ended, and he was succeeded by Roberts. Upon assuming the post of Inspector General, Roberts submitted an affidavit to the district court averring that she had "taken no action as to any employee based on the [directives]," and that she does "not consider the . . . directives to be the official policy of the Office of the Inspector General."

After discovery, the plaintiffs filed a motion for partial summary judgment, arguing that they are entitled to judgment as a matter of law on their prior restraint claims. Thompson responded with his own motion for summary judgment, seeking judgment as a matter of law on both the prior restraint claim and the retaliation claim. Thompson argued that he did not violate any of plaintiffs' constitutional rights and that, in any event, he was entitled to qualified immunity as to both claims. In pressing his claim, Thompson asserted that the plaintiffs were confidential "policymaking" employees--or that he reasonably believed them to be "policymaking" employees--who could be fired for disloyal speech, and that therefore he could also place prior restraints on their expressive activity. Roberts, having formally disavowed Thompson's pre-clearance directive, sought to be dismissed from the suit.

In October, 2003, the district court ruled on the parties' motions for summary judgment. The court granted the plaintiffs' motion for summary judgment on the prior restraint claim, holding that Thompson's directives constituted a prior restraint on speech, plaintiffs' speech was constitutionally protected, Thompson's interest in preventing the speech did not outweigh plaintiffs' interest in commenting on matters of public concern and plaintiffs were not policymaking or

confidential employees. *Wernsing*, 286 F. Supp. 2d at 992-97. The court next denied Thompson's motion for summary judgment on the retaliation claim, holding that plaintiffs' emails to Thompson (and Wernsing's inquiry regarding the scope of his directive) were constitutionally protected speech and material questions of fact remained as to whether this speech was a motivating factor in Thompson's alleged retaliatory acts against them. *Id.* at 997-99. The district court also rejected Thompson's claim of qualified immunity, holding that it was clearly established that Thompson's alleged actions restricting or retaliating against plaintiffs' speech on matters of public concern violated plaintiffs' constitutional rights. *Id.* at 999-1001. However, the district court did grant Thompson's motion for summary judgment with respect to plaintiffs' request for injunctive relief, holding that there was no substantial likelihood that Thompson's successor as Inspector General (Sydney Roberts) would enforce Thompson's directives. *Id.* at 1001-02. The court accordingly also dismissed Roberts as a defendant in the case. *Id.*

Thompson now appeals the ruling of the district court, claiming that he is entitled to qualified immunity as to all of plaintiffs' claims.

II. JURISDICTION

Subject to the standing requirements of Article III--to be addressed in our discussion of plaintiffs' prior restraint claim--the district court had jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331, 1343(a). This Court's jurisdiction now rests on 28 U.S.C. § 1291, which provides for appellate jurisdiction over all final orders issued by the district court. Under the collateral order doctrine, the district court's denial of Thompson's motion for summary judgment

based on qualified immunity is an immediately appealable "final decision" within the meaning of 28 U.S.C. § 1291 to the extent that it turns on legal rather than factual questions. *See Behrens v. Pelletier*, 516 U.S. 299, 311, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 528-30, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985); *Tangwall v. Stuckey*, 135 F.3d 510, 515-16 (7th Cir. 1998). However, a defendant invoking an immunity defense "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995).

III. STANDARD OF REVIEW

This Court reviews *de novo* the district court's denial of a motion for summary judgment based on qualified immunity. *Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991). Summary judgment is warranted when the evidence, viewed in a light most favorable to the non-moving party, presents "no genuine issue as to any material fact" such that "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

IV. DISCUSSION

Thompson appeals the ruling of the district court below, claiming that he is entitled to qualified immunity on both the First Amendment retaliation claim and the prior restraint claim. In *Harlow v. Fitzgerald*, the Supreme Court held that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Under *Harlow* and its progeny, a court evaluating a claim of qualified immunity must conduct a now-familiar two-step inquiry: First the court must determine whether the disputed conduct, as alleged, violates a constitutional right; second, the court must determine whether that right was "clearly established" at the time of the alleged conduct. *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The Supreme Court has explained the "clearly established" analysis as follows:

This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.*

Id. at 201-02 (internal citations and quotations omitted) (emphasis added). The plaintiff carries the burden of establishing that a given right is "clearly established," *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993), and to do so the plaintiff must demonstrate either that a court has upheld the purported right in a case factually similar to the one under review, or that the alleged misconduct constituted an obvious violation of a constitutional right. *Chan v. Wodnicki*, 123 F.3d 1005, 1008 (7th Cir. 1997). However, "liability is not

predicated upon the existence of a prior case that is directly on point." *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996).

Mindful of these precedents, we can now address the specific claims before us. For each claim we must determine (1) whether plaintiffs have alleged violation of a valid constitutional right and (2) whether that right was "clearly established" at the time of the alleged misconduct. In this case the relevant time frames begin on or about December 5, 2000, for the prior restraint claim (the date that Thompson sent his directive to the plaintiffs) and January of 2001 for the retaliation claim (the date that Thompson began a series of alleged reprisals against the plaintiffs).

A. Prior Restraint Claim

1. Justiciability

Before addressing the merits of plaintiffs' prior restraint claim,³ we must first consider threshold issues of

³ We note at the outset that the plaintiffs, in challenging an internal e-mail as a "prior restraint" on speech, advance a somewhat unconventional claim. Prior restraints frequently arise in the form of judicial injunctions against certain types of speech (to which the collateral-bar rule applies), or, perhaps less commonly, in the form of formal statutes or regulations barring or constraining certain expressive activity. *But see Crue v. Aiken*, 370 F.3d 668, 679-80 (7th Cir. 2004) (characterizing a university president's internal pre-clearance directive, disseminated via e-mail, as a prior restraint on speech). Here, since both sides have used the phrase "prior restraint" in marshaling their arguments, we will also use that term. However, we offer no view as to whether, as a general proposition, an e-mail directive should always be analyzed in the same way as

justiciability, which bear on our jurisdiction. "Jurisdiction is the 'power to declare law,' and without it the federal courts cannot proceed." *Hay v. Ind. State Bd. of Tax Comm'rs*, 312 F.3d 876, 879 (7th Cir. 2002) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999)). "Accordingly, not only may the federal courts police subject matter jurisdiction *sua sponte*, they must." *Id.* (emphasis in original); *see also Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 660 (7th Cir. 1998) ("A court of appeals has an obligation to examine its jurisdiction *sua sponte*, even if the parties fail to raise a jurisdictional issue.").

First and foremost is the question of standing. "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). "The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). The "irreducible constitutional minimum" of standing requires three elements:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third,

an injunction, statute or a formal regulation.

it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-561 (internal citations and quotation marks omitted).

Thompson argues that plaintiffs lack standing to challenge his pre-clearance directive since they have not demonstrated any "actual injury or any imminent threat of injury due to the directive." (Thompson May 27, 2005 Supp. Mem. at 4.) Specifically, he claims that, in order to make out a concrete "injury in fact" for standing purposes, plaintiffs must have sought permission to speak, been denied, spoken out anyway and been subject to discipline. (*Id.* at 9.) This argument is both conceptually and legally flawed. First, the hypothetical chain of events outlined by Thompson describes a First Amendment retaliation case involving post-hoc punishment for disfavored speech, not a prior restraint which seeks to limit expressive activity before it occurs. Thompson's proposed paradigm would preclude litigation of prior restraints altogether.

Second and more fundamentally, the Supreme Court and this Court have held that government policies placing prior restraints on employee speech may be challenged facially. That is, government employees whose speech is limited by an internal policy or a pre-clearance directive such as Thompson's need not seek permission to speak or violate the directive in order to challenge the directive in court. See *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 461-62, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995) (allowing facial challenge to a ban on honoraria for public speaking by government employees); *Crue v. Aiken*, 370 F.3d 668, 679-80 (7th Cir. 2004) (allowing challenge to

pre-clearance directive by both plaintiff who had sought permission to speak and plaintiffs who had not); *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998) (allowing facial challenge to city agency's pre-clearance directive banning unapproved speech to the media); *Providence Firefighters Local 799 v. City of Providence*, 26 F. Supp. 2d 350, 354 (D.R.I. 1998) (citing *NTEU* for this proposition).⁴

⁴ Thompson cites the Ninth Circuit's decision in *Portland Police Association v. City of Portland*, 658 F.2d 1272 (9th Cir. 1981), in support of his argument that plaintiffs lack standing. However, Thompson's reliance on *Portland Police* is misplaced. In that case, the Ninth Circuit held that the Police Association could not challenge a new order from the police chief requiring police officers to prepare reports after "major incidents" and precluding them from consulting with an attorney unless their superiors determined that they might be exposed to employment sanctions or criminal liability. The court determined that since injurious application of the order to any single officer hinged on a number of contingencies, none of which had come to pass, the plaintiffs' claims of injury were too speculative and abstract to confer standing in federal court. *Id.* at 1273-74.

Here, by contrast, the injurious effects of Thompson's directive do not depend on any external contingency. The very existence of such a pre-clearance requirement raises the specter of self-censorship, even among those who ultimately receive permission to speak. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) ("The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L. Ed. 1093, 60 S. Ct. 736 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.");

Yet establishing that plaintiffs may, as a general proposition, facially challenge a pre-clearance directive like Thompson's gets us only half way home. The undisputed evidence reveals that Thompson's directive is no longer in force, and this raises the specter of mootness. Implicit in the "case-or-controversy" requirement of Article III is the principle that "federal courts may not give opinions upon moot questions or abstract propositions." *Worldwide St. Preachers' Fellowship v. Peterson*, 388 F.3d 555, 558 (7th Cir. 2004) (internal quotations omitted). Here the district court did indeed find the issue of plaintiffs' requested injunctive relief to be moot. 286 F. Supp. 2d at 1001-02. The court reasoned that "as Defendants have sufficiently demonstrated that the policy from which Plaintiffs sought relief no longer exists and that the illegal prior restraint of speech at issue in this case cannot reasonably be expected to reoccur, the claim for injunctive relief is effectively moot, as there is no need to enjoin prospective action that would violate federal law." *Id.*

This determination appears to be correct. While the mootness doctrine does not necessarily apply to voluntary cessation of illegal activity, *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 747 (7th Cir. 1999), or to actions "capable of repetition yet evading review," *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000), "the moving party must still satisfy the court that injunctive relief is required," *Milwaukee Police Ass'n*, 192 F.3d at 748. "The necessary determination is that there exists some cognizable danger of recurrent violation,

Harman, 140 F.3d at 120 (same) (citing *City of Lakewood*). This is precisely why facial challenges to such directives are permitted.

something more than the mere possibility which serves to keep the case alive.' " *Id.* (quoting *W.T. Grant*, 345 U.S. at 633). The mere "theoretical possibility" of a repeat violation is not enough. *Walsh v. United States Dep't of Veterans Affairs*, 400 F.3d 535, 537 (7th Cir. 2005); *accord United States v. Ladd (In re AP)*, 162 F.3d 503, 511 (7th Cir. 1998) (requiring a "reasonable expectation that the same complaining party would be subjected to the same action again") (internal quotations omitted).

Here Sydney Roberts, Thompson's successor, theoretically could reimpose his pre-clearance directive, but nothing in the record suggests that she is likely to do so. Her uncontested affidavit states that she has "taken no action as to any employee based on the [directive]," and that she does "not consider the . . . [directive] to be the official policy of the Office of the Inspector General." The directive at issue was personal to Thompson, and the possibility of a recurrence remains purely speculative. Thus even assuming that Thompson's directive constitutes an impermissible restraint on speech, there remains no misconduct for this court to enjoin. We have quite recently held that where an internal pre-clearance directive such as this one is permanently withdrawn or disclaimed by the government/employer, any claims for injunctive relief are moot. See *Crue v. Aiken*, 370 F.3d 668, 677-78 (7th Cir. 2004).

Plaintiffs' argument that Thompson's appeal does not implicate the district court's mootness determination--and thus that the mootness issue is not properly before us--is also unavailing. Mootness, like standing, "is always a threshold jurisdictional question that we must address even when it is not raised by the parties." *Peterson*, 388 F.3d at 558; see also *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed.

2d 413, 92 S. Ct. 402 (1971). Plaintiffs' claim for injunctive relief is moot and will not figure in our analysis here.

However, plaintiffs also seek monetary damages for humiliation, stress and emotional anguish resulting from the imposition of the directive. Such claims are not moot, even if the underlying misconduct which caused the injury has ended. See *Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969) (holding that although injunctive relief was moot, a case or controversy still existed since the plaintiff requested declaratory relief and damages); *Crue*, 370 F.3d at 677-678 (holding that although the plaintiff's request for injunctive relief was moot, the court had to consider the merits of the case since requests for declaratory relief and damages remained).⁵ Generally, any "person whose injury can be redressed by a favorable judgment has standing to litigate," *Fed. Deposit Ins. Corp. v. Ernst & Young LLP*, 374 F.3d 579, 581 (7th Cir. 2004), and injuries compensable in monetary damages can always be redressed by a court judgment. Similarly, "when a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive." *Crue*, 370 F.3d at 677.

Thus while plaintiffs' claim for injunctive relief is moot, plaintiffs' claims for monetary damages and declaratory relief still present a live case or controversy, and therefore we must

⁵ This approach squares with the general proposition that "where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests." *Powell*, 395 U.S. at 496 n.8.

proceed to consider the substantive merits of plaintiffs' prior restraint claim.

2. The Merits

In granting summary judgment to the plaintiffs on their prior restraint claims, the district court ruled that Thompson's directives chilled or actually prevented plaintiffs' speech on a matter of public concern, were fatally overbroad and were based on merely conjectural concerns regarding both the content of plaintiffs' speech and its potential impact. 286 F. Supp. 2d at 992-97. Thompson's main argument on appeal—which the district court rejected, *id.* at 996-97—is that plaintiffs were “policymaking” or “confidential” employees under *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), and *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), and thus that he could restrict their speech on matters relating to OIG operations. The logic of Thompson’s argument is that since such “policymaking” employees may actually be *fired* for disloyal expressive activity under *Elrod* and its progeny, he should be able to take the less extreme measure of restricting their speech in the first instance.

This line of argument is dubious on several levels. First, it appears fairly clear that ISI 2s are not “policymaking” officials under *Elrod* and its progeny. Notwithstanding the fact that ISI 2s often handle sensitive or confidential information, there is no indication that the position “authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation,” *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), or that “party affiliation is an appropriate requirement for performing the job.” *Carlson v. Gorecki*, 374 F.3d 461, 464 (7th Cir.

2004); *accord Branti*, 445 U.S. at 518 (same test). At least one district court has specifically held it to be clearly established that ISI 2s are *not* policymaking employees. *Thornburg v. Peters*, 155 F. Supp. 2d 984, 990-91 (C.D. Ill. 2001); *see also* 20 Ill. Comp. Stat. 415/4a(2) (2005) (suggesting that ISI 2 positions are not political appointments but are to be held based on “merit and fitness”).

Yet even if this point could be disputed,⁶ the plaintiffs’ status as policymaking employees is not necessarily relevant to the legality of Thompson’s directive. Even assuming that Thompson could fire the plaintiffs for certain speech activity, it does not follow that he should be able to restrain their expressive activity *ex ante*. Certainly, from an individual employee’s perspective, outright termination might appear the more extreme disciplinary measure. However, purely as a matter of First Amendment freedoms, the public ramifications

⁶ As the parties point out in their briefs, the case law pulls in somewhat different directions on this point. *Compare Americanos v. Carter*, 74 F.3d 138, 142-43 (7th Cir. 1996) (holding that an Indiana Deputy Attorney General qualified as a policymaker since he researched complex legal issues concerning cases in the AG’s office and had “the direct ability to implement the policies and goals of the AG for the State of Indiana”) and *Hudson v. Burke*, 913 F.2d 427, 431-32 (7th Cir. 1990) (holding that the district court did not commit clear error by ruling that “investigators” or “legislative aides” for the City of Chicago Finance Committee were policymaking employees since they “have ‘inherent’ in their position the power to investigate, report facts and have input into those areas of politically sensitive governmental decisionmaking”) with *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991) (affirming a jury verdict in favor of a Legal Investigator in the Gary, Indiana City Legal Department, ruling there was ample evidence that he was not a policymaking employee).

of a prior restraint on speech may actually be far more severe. Unlike *ex post* reprisals for speech activity, a prospective restriction "chills potential speech before it happens," depriving the public of information that might otherwise be disseminated. *NTEU*, 513 U.S. at 468. It is therefore well settled that the government's prospective restriction of future speech is approached with a greater presumption of unconstitutionality than post-hoc disciplinary actions against specific employees for speech already uttered. *NTEU*, 513 U.S. at 467-68; *Crue v. Aiken*, 370 F.3d at 678; *Milwaukee Police Ass'n*, 192 F.3d at 749-50.⁷

Accordingly, the *Elrod* policymaker rule is traditionally applied only in cases of patronage hiring and firing, *see, e.g.*, *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 354-57 (7th Cir. 2005); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 751-52 (7th Cir. 2002), or in cases of First Amendment retaliation, *see, e.g.*, *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 970, 971-72 (7th Cir. 2001); *Bonds v. Milwaukee County*, 207 F.3d 969, 977 (7th Cir.), *cert. denied*, 531 U.S. 944, 148 L. Ed. 2d 273, 121 S. Ct. 340 (2000). Accepting Thompson's novel rule would imply a bold and perhaps unwarranted departure from both Supreme Court

⁷ In order to justify such a prospective restriction, the government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering v. Board of Educ.*, 391 U.S., 563, 571, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)); *see also Milwaukee Police Ass'n*, 192 F.3d at 750 (same) (quoting *NTEU*, 513 U.S. at 468). This is a more onerous burden than that required to justify post-hoc reprisals for expressive activity. *See Sullivan v. Ramirez*, 360 F.3d 692, 698 (7th Cir. 2004).

precedent and traditional understandings of *Elrod* and its progeny. Nothing in the case law anticipates an absolute "policymaker" exception for prior restraint claims, and this would fly in the face of the Supreme Court's distinction between prospective regulations and ad hoc retaliation for specific instances of speech. The approach actually suggested by the case law is probably one whereby the politically sensitive or secretive nature of the employment context can factor into the court's evaluation of the government's justification for prohibiting the speech, including the "expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 US. at 571).

Perhaps anticipating these difficulties, Thompson also argues, in the alternative, that even if plaintiffs are not considered policymaking employees, or even if the "policy-maker" exception outlined in *Elrod* does not apply to prior restraint claims, those propositions were not clearly established at the time of his alleged misconduct. For these reasons, Thompson claims he is entitled to qualified immunity.

We are satisfied that Thompson is entitled to qualified immunity, though not for the precise reasons he advances. Simply put, Thompson must prevail in the present suit since it was not clearly established, at the time the pre-clearance directive was first issued (December 5, 2000), that such a directive constituted an unlawful prior restraint on speech.

Of course the case law on prior restraints is replete with decisions invalidating zoning ordinances, licensing schemes, permit regulations and other official acts that limit expressive activity. Additionally, our recent decision in *Crue v Aiken*, where we held a similar pre-clearance directive to constitute

an unlawful prior restraint on speech, casts serious doubt upon the legality of Thompson's directive. *See Crue*, 370 F.3d at 680 (holding unconstitutional a university chancellor's pre-clearance directive banning all speech directed toward prospective student athletes without prior permission). However, while the constitutional limits of restraints applicable to the general public are well-settled, and while the Supreme Court has struck down formal statutory bans of certain speech activity by government employees, *see NTEU*, 513 U.S. 454, the prerogatives of a government supervisor in managing the communications of his own staff are far less clear. We emphasize that our analysis of qualified immunity here is focused specifically and exclusively on this kind of relatively informal supervisory directive aimed at close subordinates.⁸ In December 2000 case law touching on this kind of internal pre-clearance directive was decidedly scant and, to the extent that it existed at all, actually suggested that such directives are permissible.

Indeed we have approved similar pre-clearance screening directives before. In *Zook v. Brown*, a case that came before this Court twice, we upheld a sheriff's department regulation prohibiting officers from engaging in testimonials or advertisements without prior approval of the sheriff. 865 F.2d 887, 891-92 (7th Cir. 1989) (*Zook II*). We reasoned that the sheriff had a legitimate interest in maintaining the appearance of integrity and impartiality of the police force, and the restrictions were sufficiently tailored to a narrow

⁸ In this respect the present case differs significantly from *Crue*. The e-mail directive at issue in *Crue*, issued by the president of the University of Illinois, applied not just to the president's own staff or other University employees, but to all University students and all "others associated with the University." 370 F.3d at 674-75.

category of problematic speech--ads and testimonials. *Id.* Moreover, in our first treatment of *Zook* we actually held that any legal infirmity in the sheriff's order was *not* clearly established at the time of the order. *Zook v. Brown*, 748 F.2d 1161, 1165 (7th Cir. 1984) (*Zook I*). In a subsequent case, we also upheld elementary school rules requiring students to obtain prior approval of the school principal before distributing private handbills. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996). But see *Fujishima v. Bd. of Educ.*, 460 F.2d 1355 (7th Cir. 1972) (holding unconstitutional a board of education rule prohibiting any person from distributing any publications on school premises without prior approval of the general superintendent of schools).

Two earlier Supreme Court cases dealing with pre-publication screening regulations in government agencies also point in the same direction. In *Brown v. Glines*, 444 U.S. 348, 62 L. Ed. 2d 540, 100 S. Ct. 594 (1980), the Court upheld Air Force regulations requiring service members to obtain approval from their commanders before circulating petitions on Air Force bases. In *Snepp v. United States*, 444 U.S. 507, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980), the Court upheld the enforcement of an agreement signed by an agent of the CIA whereby he promised not to publish any information "relating to the Agency," during or after his term of employment, "without specific prior approval by the Agency". *Id.* at 507; cf. *Weaver v United States Info. Agency*, 318 U.S. App. D.C. 420, 87 F.3d 1429, 1443 (D.C. Cir. 1996) (upholding regulation requiring employees of U.S. Information Agency and certain other federal agencies to submit materials regarding matters of official concern to pre-publication screening).

To be sure, these cases are in some respects distinguishable from the present case. The regulation at issue in *Zook* (which was limited to ads and testimonials) was far more narrowly tailored than the one issued by Thompson here, which simply prohibited all communication regarding OIG operations with any "external agent." Additionally, even as it affirmed the sheriff's screening of police officer advertisements and testimonials, the panel in *Zook* reiterated its belief that the regulation would not prohibit speech on matters of public concern and warned against broader restrictions that might give "unfettered enforcement discretion." 865 F.2d at 892. Most of the other cited cases also involve unique institutional settings such as an elementary school (*Muller*), the armed forces (*Brown*) and the CIA (*Snepp*), contexts where the government presumably has a heightened interest in preempting certain types of speech. Additionally, all of these cases predated the Supreme Court's more exacting pronouncements on prior restraints in *NTEU* and *Davis*.

Yet all this is just to say that Thompson's directive was not clearly *authorized* by existing case law as of November 2000. The relevant question, however, is not whether his actions were expressly authorized by existing law, but whether they were clearly *forbidden*--i.e., whether a reasonable official would have known the actions in question were illegal. *Saucier*, 533 U.S. 194 at 202, 150 L. Ed. 2d 272 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). In the absence of a case factually similar to the one at bar, an official is entitled to qualified immunity unless the alleged misconduct constitutes an obvious violation of a constitutional right. *Chan*, 123 F.3d at 1008. Yet to the extent that these cases--distinguishable as

they are--point in any direction, they suggest that pre-clearance directives such as this one are permissible.

The institutional context of Thompson's directive is also relevant here. While it is not the CIA, the OIG is an agency that depends on confidentiality and secrecy in carrying out its public mission. In the course of its investigations the OIG routinely handles extremely sensitive information, and its employees must adhere to strict confidentiality requirements. Under the circumstances--and given the state of the law at the time--it may not have been unreasonable for Thompson to think that he could instruct his own employees not to discuss agency business with outside parties.

The district court, of course, arrived at a contrary ruling, stating that "long before Thompson issued his directive, the Supreme Court had held that 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity,'" and asserting that "it was equally well-established that prior restraints, often referred to as a 'most extraordinary remedy', have been upheld 'only where the evil that would result from there portage is both great and certain and cannot be militated by less intrusive measures.'" 286 F. Supp. 2d at 999 (quoting *CBS Inc. v. Davis*, 510 U.S. 1315, 1317, 127 L. Ed. 2d 358, 114 S. Ct. 912 (1994)). The district court concluded by stating that "it was clearly established prior to December 2000 that if Plaintiffs wanted to speak on a matter of public concern, and their interests in doing so outweighed any of Thompson's legitimate interests, precluding their speech without substantial justification and retaliating against them for that speech would be illegal." *Id.* at 1000.

Yet this formulation is exactly what the Supreme Court has instructed courts *not* to do--it frames the clearly

established inquiry in terms of a general proposition rather than the specific factual situation that confronted the defendant official. The Court has been quite clear that “this inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*” *Saucier*, 533 U.S. at 201-02 (emphases added). If the clearly established question could be resolved merely by observing that unjustified prior restraints on speech are prohibited, then no defendant could ever prevail on the clearly established prong of the qualified immunity analysis—the inquiry would always produce an outcome identical to that issuing from the first prong of the immunity analysis (violation of a valid legal right).⁹

In short, a reasonable official in Thompson’s position could not have known definitively, in December 2000, whether issuing such a pre-clearance directive violated plaintiffs’ First Amendment rights. *See Saucier*, 533 U.S. at 202. Accordingly, Thompson’s motion for summary judgment based on qualified immunity must be granted.¹⁰

⁹ It appears that the panel in *Crue* may have similarly misframed the clearly established analysis, *see* 370 F.3d at 680, however we have no occasion to offer any ruling on this point.

¹⁰ Contrary to the district court’s suggestion, the Supreme Court’s decision in *NTEU* does not itself resolve the “clearly established” inquiry. That case involved a formal statutory ban prohibiting unconditionally the receipt of honoraria by *all* government employees. Such a sweeping legal enactment is clearly distinct from the kind of informal, internal directive at issue here.

B. First Amendment Retaliation Claim

Unlike plaintiffs' prior restraint claim, there is no doubt that the retaliation claim presents a live case or controversy. The sole question here concerns the merits of Thompson's motion for summary judgment on grounds of qualified immunity.

It is by now well established that the government may not arbitrarily silence the constitutionally-protected speech of its employees. Government workers do not forfeit their First Amendment rights simply by accepting public-sector employment. Claims of retaliation for exercise of First Amendment rights in the public employment context are evaluated through a now-familiar three-step analysis. "First, the court must determine whether the employee's speech was constitutionally protected under the *Connick-Pickering* test. Second, the plaintiff must establish that the speech was a substantial or motivating factor in the retaliatory action. Third, the defendant has an opportunity to establish that the same action would have been taken in the absence of the employee's protected speech." *Sullivan v. Ramirez*, 360 F.3d 692, 697 (7th Cir. 2004).

In order to determine whether speech is constitutionally protected, we must engage in a two-part inquiry known as the "*Connick-Pickering* test." *Id.* (citing *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999); *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)). "Under *Connick*, we must determine whether the speech addressed a matter of public concern. If the speech did involve such a concern, under the *Pickering* balancing test, we then must determine whether the government's interest as an employer in providing effective and efficient services

outweighs the employee's interest as a citizen in commenting upon the matter of public concern." *Id.* at 698. "The determination of whether the speech is constitutionally protected is a question of law for the court." *Id.* (citing *Kokkinis v. Ivkovich*, 185 F.3d 840, 843 (7th Cir. 1999)).

Here we need proceed no further than the *Connick* public concern inquiry. Plaintiffs have failed to demonstrate that they engaged in speech on a matter of public concern, and therefore Thompson is entitled to qualified immunity as a matter of law.

There are three incidents of potentially protected speech at issue in this case: (1) Plaintiffs' November 2000 e-mails to Thompson requesting a meeting to discuss unspecified concerns about a rumored appointment, (2) Wernsing's January 2001 inquiry requesting clarification of the scope of Thompson's directives and (3) plaintiffs' meeting with Thompson in March 2001 where they articulated their specific concerns regarding Fuentes' possible appointment as Southern Bureau chief. Since the plaintiffs did not advance their speech at the March 2001 meeting as a basis for their retaliation claim before the district court, they have waived any argument based on this speech. See *Premcor USA, Inc. v. Am. Home Assurance Co.*, 400 F.3d 523, 530 (7th Cir. 2005) ("We need not tarry over this argument; it was not presented to the district court and was, therefore, waived."); *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) ("A party waives any argument that it does not raise before the district court . . .") (internal quotations omitted).

That leaves plaintiffs' e-mails to Thompson and Wernsing's inquiry regarding the scope of Thompson's directive. Whether a government employee's speech addresses a matter of public concern depends upon "the content, form,

and context of [the speech], as revealed by the whole record." *Connick*, 461 U.S. at 147-48; *see also Gustafson v. Jones*, 290 F.3d 895, 906-07 (7th Cir. 2002) (quoting *Connick*); *Ramirez*, 360 F.3d at 699 (same). Among these factors the content of the speech is the most important. *See Ramirez*, 360 F.3d at 699. To satisfy the public concern requirement, the speech in question "must relate to a community concern" and may not be "merely a personal grievance of interest only to the employee." *Id.* (internal quotations omitted).

1. Plaintiffs' e-mails

With respect to plaintiffs' e-mails, the district court ruled that, while the e-mails did not articulate any specific grievance or concern, they nonetheless constituted speech on a matter of public concern since "the speech involved an effort by employees to bring to light claims of actual mismanagement and gross negligence in the conduct of OIG business by Fuentes . . ." 286 F. Supp. 2d at 994. The court explained that "although the e-mails were vague and lacking in specific details, the text of the e-mails can reasonably be read to support Plaintiffs' asserted public purpose in speaking, as well as the contention that their complaints were motivated by considerations of public safety and the welfare of the mentally ill and developmentally disabled persons receiving DHS services who did not receive adequate protection during Fuentes' alleged mismanagement of the Southern Bureau." *Id.* Having determined that plaintiffs' e-mails fit the bill, the district court apparently did not reach the question whether Wernsing's inquiry qualified as speech on a matter of public concern as well.

This ruling was erroneous. Plaintiffs' e-mails cannot be considered speech on a matter of public concern for the simple reason that they articulate no particular view-point,

grievance or complaint; they merely request a meeting with Thompson. In pressing their case, plaintiffs argue as if their concerns about Fuentes had actually been aired in the two e-mails. They had not. Regardless of whether the appointment of an incompetent director to the OIG Southern Bureau constitutes a matter of public concern,¹¹ we need not mire ourselves in hypotheticals because plaintiffs' e-mails never broached this topic. They said only that they wanted to meet with Thompson to discuss unspecified "concerns" about a potential appointment in the OIG.

Apparently recognizing this fundamental difficulty, plaintiffs argue in their brief that the content "desired to be communicated" is a key consideration, and they ask us to focus our inquiry on the "*underlying speech*--the speech that the Plaintiffs *sought* to bring to defendant's attention by *means* of the e-mails." (Bingaman & Cannon Br. at 15 (emphasis in original).) They cite *Smith v. Fruin*, 28 F.3d 646, 651 (7th Cir. 1994), for the proposition that "the *point* of the speech in question" is relevant to the public concern inquiry. *Id.* (emphasis in original). This line of argument is nonsensical. In their references to "underlying speech" that is "sought" to be expressed, plaintiffs are actually referring to speech which has not yet occurred, which, for First Amendment retaliation purposes, is no speech at all. This Court's precedents instruct that the *content* of the speech is the most important factor in determining the public concern element, *see Ramirez*, 360

¹¹ Because we need not reach this issue, we decline to offer a definitive ruling on the substantive nature of plaintiffs' underlying concerns. Aside from the fact that Article Three prohibits us from issuing advisory rulings, *see Lujan*, 504 U.S. at 560, the Supreme Court appears poised to consider a similar question in *Garcetti v. Ceballos*, which will be argued later this Fall, 161 L. Ed. 2d 188, 125 S. Ct. 1395 (2005) (granting certiorari).

F.3d at 699, not the inchoate intentions or views that the speaker privately holds.

We have previously held that otherwise unprotected speech does not suddenly attain protected status simply because it is animated by a viewpoint which, if actually expressed, might itself merit First Amendment protection. For example, in *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992), we ruled that university faculty members' request for external review of a faculty committee that made recommendations on professional advancement did not touch upon a matter of public concern, even though plaintiffs had claimed that the committee was biased against faculty members who had not joined the faculty union. *Id.* at 586. We noted that while speech relating to unionizing and collective activity may be a matter of public concern, the speech at issue--the request for an external review--failed to specify that this was the nature of the committee's bias.¹² *Id.* Similarly, in *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984), we ruled that an employee's expression of happiness upon hearing a rumor that the director of her office had been fired¹³ was not speech that touched on a matter of public concern. *Id.* at 296. We explained that although the question whether the director was adequately qualified would constitute a matter of public concern, the plaintiff's bare statement of approval conveyed no information about the director's actual

¹² This lack of specificity was not the only basis for our ruling on the public concern issue in *Colburn*. We also noted that the plaintiffs were not attempting to inform the public about the matter--their primary motivation concerned their own standing within the university. See 973 F.2d at 586.

¹³ Plaintiff merely asked a co-worker: "Did you hear the good news?"

qualifications and would provide no basis for determining them. *Id.*¹⁴

In the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or unuttered thoughts. Government officials are not mind readers. The fact that members of the OIG wanted to meet with the Inspector General about the rumored appointment of an unspecified person does not, by itself, constitute a matter of concern to the public.

Perhaps recognizing that Thompson's psychic powers are limited, the plaintiffs next argue that Thompson should have attempted to ascertain the unspecified "concerns" that lay behind plaintiffs' cryptic e-mails; they assert that any uncertainty as to their viewpoints or motives was caused by Thompson's failure to follow up or investigate. The plaintiffs argue that *Waters v. Churchill*, 511 U.S. 661, 677-78, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994), establishes a general "duty, before retaliating, to reasonably inquire as to the nature of the concerns which Plaintiffs asked to express."

¹⁴ Our disposition here also finds support in *Connick* itself--the very font of the modern public concern analysis. The Court in *Connick* ruled that several internal survey questions circulated by the plaintiff did *not* touch on matters of public concern since "if released to the public, [the questions] would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. 138, 148, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Similarly, plaintiffs' e-mails here contained no information that would have been useful or noteworthy to the public at large, and if disseminated would reveal only that several OIG staff members sought a meeting with the Inspector General to air unspecified concerns about an unspecified appointment.

(Wernsing Br. at 29.) *Waters* stands for no such proposition. *Waters* holds that government supervisors must make a reasonable investigation into the content of the speech at issue and the identity of the relevant speakers before disciplining their employees for expressive activity. It articulates a factor that courts should consider in evaluating an employer's response to speech under the *Pickering* balancing test, and it helps to clarify "what should happen if the defendants hold an erroneous and unreasonable belief about what plaintiff said." *Id.* at 678.

Here, of course, there was no erroneous or unreasonable belief about what plaintiffs said--Thompson received the full text of both e-mails and correctly identified all the authors. More fundamentally, *Waters* and its progeny do not address the antecedent question whether the speech at issue, considered in its own right, addresses a matter of public concern, and it certainly does not enshrine any duty to investigate the possible meaning of a facially innocuous communication or random missive from an employee.¹⁵ It would be unduly onerous to place a legal duty on government employers to ascertain whether employees who make vague requests for meetings might have something of public concern in mind.

¹⁵ The other cases cited by plaintiffs, e.g., *Jefferson v. Ambroz*, 90 F.3d 1291, 1299 (7th Cir. 1996) (Rovner, J., concurring), similarly bear on the reasonableness of a supervisor's response to speech, not the public concern aspect of the speech itself.

2. Wernsing's Inquiry

This brings us to Wernsing's request for clarification of Thompson's directive--specifically, her inquiry as to whether the directive permitted her to discuss office business with her union representative, an attorney or a legislator. This act of "speech" meets the same fate as plaintiffs' e-mails. While it might be of mild interest to the public that Thompson had issued such a pre-clearance directive--and plaintiffs' briefs make a weak gesture in this direction--Wernsing clearly was not seeking to protest the directive, disseminate information or express any particular viewpoint about it. She was merely seeking clarification as to how the directive applied to her individually. The posture of Wernsing's inquiry is analogous to the internal questionnaire circulated by the plaintiff in *Connick*, who

did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [the plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo.

461 U.S. at 148; cf. *Colburn*, 973 F.2d at 586-87 (request by faculty members for an independent review of a faculty evaluation committee did not raise a matter of public concern since, while "the public would be displeased to learn that faculty members at a public university were evaluating their colleagues based on personal biases," the request was "principally of importance to the few faculty members who had to tolerate the bickering").

Internal communications regarding office personnel policies, which allege no malfeasance or wrongdoing, simply are not the stuff of protected speech. Accordingly, Wernsing's inquiry does not constitute speech on a matter of public concern.

* * *

Since the expressive activity underlying plaintiffs' retaliation claim does not constitute speech on a matter of public concern, we reverse the district court's ruling with respect to this claim. Thompson's motion for summary judgment on grounds of qualified immunity should have been granted.

V. CONCLUSION

For the foregoing reasons, we REVERSE the ruling of the district court and REMAND this case with instructions to grant Thompson summary judgment with respect to all claims on grounds of qualified immunity.

APPENDIX C

**UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF ILLINOIS,
PEORIA DIVISION**

No. 01-1476

[Filed October 9, 2003]

| | |
|----------------------------------|---|
| JENNY WERNING, CHARLES BINGAMON, |) |
| and TROY CANNON, |) |
| Plaintiffs, |) |
| |) |
| v. |) |
| |) |
| ODELL THOMPSON, JR., |) |
| Defendant. |) |
| |) |

JUDGES: Michael M. Mihm, United States District
Judge.

OPINION

This matter is before the Court on several motions for summary judgment. For the reasons set forth below, Wernsing's Motion for Partial Summary Judgment [# 36] is

GRANTED. Bingaman¹ and Cannon's Motion for Partial Summary Judgment [# 41] is GRANTED, and Defendants' Motion for Summary Judgment [# 43] is GRANTED IN PART and DENIED IN PART.

Factual and Procedural Background

Plaintiff, Jenny Wernsing ("Wernsing"), is an Internal Security Investigator II ("ISI 2") in the Inspector General's Office ("OIG") for the Department of Human Services ("DHS") of the State of Illinois. Plaintiffs Charles Bingaman ("Bingaman") and Troy Cannon ("Cannon") were also ISI 2s during the time relevant to this proceeding, although Bingaman also had other duties at various times. The OIG investigates reports of abuse and neglect toward mentally ill and developmentally disabled persons who receive services provided by the DHS. According to the job description, an ISI 2:

Performs highly responsible, sensitive, and confidential investigative work; conducts the gathering and analysis of relevant facts and data concerning abuse and neglect investigations; completes investigations by preparing reports, summarizing investigative activities and recommends conclusions to findings.

¹ The Court notes that Plaintiff Bingaman's name is spelled no less than three different ways in the pleadings of both parties. Accordingly, the proper spelling of his name is unclear, and the Court will use the spelling that appears on his personnel documents of record for purposes of this motion.

SPECIFICALLY:

1. Conducts confidential, sensitive, and complex investigations concerning reports of abuse and neglect at State-operated facilities and community agencies; gathers data and evidence, conducts interviews, receives reports and analyzes relevant evidence concerning cases of abuse and neglect; ensures that case reports are comprehensive and accurate; takes initial statements from staff.
2. Prepares written investigative reports upon the completion of the investigative process consisting of a summary of actions taken, findings, preservations of evidence and recommendation for corrective action and/or case closure.
3. Maintains confidential files pertaining to cases under investigation; ensures the security of all pertinent information gathered during the investigatory process.
4. Recommends revisions to investigatory procedures and practices.
5. Serves as an expert witness and provides testimony in criminal and administrative hearings related to the conducting of or results of the investigation.
6. Performs other duties as required or assigned which are reasonably within the scope of the duties enumerated above.

In the fall of 2000, the OIG was organized as follows: The state was divided into four geographical Bureaus: the north

(Chicago), the metro (the area surrounding Chicago), the central, and the south. Personnel statewide consisted of approximately 31 ISI 2s, four to six team leaders, four Bureau Chiefs, the Deputy Inspector General, and the Inspector General, as well as various support personnel. ISI 2s reported to a team leader, who reported to the appropriate Bureau Chief, who reported to the Deputy Inspector General or to the Inspector General.

Defendant, Odell Thompson ("Thompson"), became the Inspector General of the DHS on July 1, 2000. On or about November 27, 2000, Thompson received an email from five employees in the OIG's Southern Bureau, including Wernsing, Bingaman, and Cannon. The email stated:

Several investigators in the Southern Bureau have some concerns we wish to discuss with you as soon as possible. These concerns are relative as to who we understand you are going to appoint as the Southern Bureau Chief. These concerns are very important and need your attention before any appointment is made.

Thompson did not respond to the email. On November 30, 2000, Thompson received another email from the same five employees in the Southern Bureau, which stated in relevant part:

We contacted you on 11/27/03 asking that you meet with us and discuss our serious concerns over who we understand to be the tentative selection for Bureau Chief. We have not heard from you. We once again ask that you meet with us. We would like if at all possible to keep this matter in house out of respect for the chain of command and in keeping with respect for your position. However, if we are not afforded this

opportunity we will feel compelled to air our concerns to the Secretary or those at the legislative level.

Again, Thompson did not respond to the request for a meeting with the five signatories and made no inquiries into the basis for the email.

The espoused concerns apparently stemmed from the fact that Wernsing had heard that Thompson was going to appoint Ron Fuentes ("Fuentes") as Bureau Chief over the Southern Bureau. Each of the signatories had worked with Fuentes when he had previously served as Bureau Chief, and had concerns about a backlog in cases and other acts of alleged mismanagement that had developed during his tenure.

On or about December 5, 2000, Thompson sent a letter to the five signatories that stated in relevant part:

The Office of Inspector General staff are not authorized to communicate about Office of Inspector General policies or operations directly to the Secretary [head of the DHS], to the press, or to any external agent except with my prior knowledge and approval.

This admonition was repeated in a second communication that was sent to all employees in the OIG in January 2001.

Wernsing understood these directives to mean that she could not talk to anyone about anything to do with OIG. She then asked her supervisor, Sandy Mott ("Mott") if the directives applied to conversations that she might have with her union representative, an attorney, or her legislator. On January 26, 2001, Mott sent an email to the Inspector General's Office relaying the question. Defendant Sydney Roberts ("Roberts"), who was at that time Deputy Inspector

General, responded with two email messages. The first read "Your people really want to try me don't they." The second email from Roberts stated:

No one in the OIG is represented by a Union that is in any sort of contractual agreement with DHS. Thus we don't have to honor anything that their union representative requests unless it is consistent with the rights all employees are entitled to by state or federal law. In other words, they follow the direction of their union representative at their own peril.

With respect to the statements made to union personnel, the courts have said that employers may regulate the speech of *certain employees in certain circumstances*. Thus, they should know the law on this matter, before discussing OIG matters with outside individuals.

(Italics in original.) On February 7, 2001, Mott emailed Wernsing with the following response:

In answer to your question, Deputy I.G. Sydney Roberts indicated to me that no one in the OIG is represented by a Union that has a contractual agreement with DHS. Thus, we don't have to honor anything that their union representative requests unless it is consistent with the rights all employees are entitled to by state or federal law. Further, with respect to statements made to union personnel, the courts have said that employer may regulate the speech of certain employees in certain circumstances. Thus, you should know the law on this matter before discussing OIG matters with outside individuals.

Thompson testified that there was nothing other than the two emails from Wernsing, et al., that caused him to issue the directives and that his concern was that he "didn't want to be sabotaged in some way or some manner" because he "just didn't know what their motives were." He also admitted that he didn't make any effort to determine what the motives of the five signatories to the emails were in suggesting communications with the Secretary of DHS or legislators and that the release of confidential information by OIG employees and contacts with the press were already covered by both statute and DHS rules. Thompson also indicated in a meeting with Bingaman in Spring 2001 that he believed that contacting a legislator about him would have been a violation of his directives.

On August 3, 2001, Wernsing brought this suit alleging that the above directives constitute a prior restraint on speech that infringes on her First and Fourteenth Amendment rights, as well as First Amendment retaliation. Bingaman and Cannon were subsequently added as Plaintiffs. The parties have now filed motions for summary judgment, which are fully briefed and ready for resolution. This Order follows.

Standards for Summary Judgment

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The moving party may meet its burden of

showing an absence of disputed material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. Nevertheless, this Court must "view the record and all inferences drawn from it in the light most favorable to the [non-moving party]." *Holland v. Jefferson Nat. Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). Summary judgment will be denied where a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995).

Discussion

I. Prior Restraint

The Plaintiffs argue that Thompson's December 2001 and January 2002 directives constitute a prior restraint on speech, as they prohibit all OIG staff from communicating about OIG policies or operations to the Secretary of DHS, the press, or any "external agent" without prior approval from Thompson. Specifically, they contend that the directives restrict a certain

type of speech, vest absolute discretion in the Inspector General as the reviewing body by authorizing judgment about the content of any proposed speech or other expressive activity, place no constraints upon the review process, refer to no appeals process, and present the likelihood of self-censorship by eliminating the possibility of anonymous speech.

Individuals do not forfeit their First Amendment rights merely by virtue of the fact that they accept employment with a governmental unit or agency. *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731, 1734 (1968). However, it is equally well-settled that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. NTEU*, 513 U.S. 454, 130 L. Ed. 2d 964, 115 S. Ct. 1003, 1012 (1995). In evaluating the constitutional propriety of a restraint on government employee speech, courts must attempt to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 88 S. Ct. at 1734-35; *Wainscott v. Henry*, 315 F.3d 844, 848 (7th Cir. 2003). Where a ban "chills potential speech before it happens . . . the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 115 S. Ct. at 1014.

Plaintiffs contend that Thompson's directives operate as a prior restraint on speech. It is well-established that "any prior restraint on expression comes to this Court with a 'heavy

presumption' against its constitutional validity." *CBS v. Davis*, 510 U.S. 1315, 127 L. Ed. 2d 358, 114 S. Ct. 912, 914 (1994). While the presumption against prior restraints "is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.'" *Id.*, citing *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625, 631 (1931). As the Supreme Court recognized in *Davis*:

Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remedy" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

114 S. Ct. at 914. The elements of a prior restraint are:

(1) the speaker must apply to the decisionmaker before engaging in the proposed communication; (2) the decisionmaker is empowered to determine whether the applicant should be granted permission based on his/her review of the proposed content of the communication; (3) approval of the request requires affirmative action by the decisionmaker; and (4) approval is not a matter of routine, but involves the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the decisionmaker.

Crue v. Aiken, 204 F. Supp. 2d 1130, 1137 (C.D.Ill. 2002), citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

Here, the directives on their face ban all speech on OIG policies and operations without prior permission from Thompson, which is at least to some degree content-based. It

also seems clear that the directive "chills potential speech instead of merely punishing actual speech already communicated" and imposes a "blanket policy designed to restrict expression by a large number of potential speakers." *Milwaukee Police Assn. v. Jones*, 192 F.3d 742, 750 (7th Cir. 1998); *Harman v. City of New York*, 140 F.3d 111, 118 (2nd Cir. 1998). Thus, they would appear to operate as prior restraints even under the Seventh Circuit's most recent pronouncements in *MacDonald v. City of Chicago*, 243 F.3d 1021, 1032-36 (7th Cir. 2001), and *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), as the directives on their face reduce certain categories of speech, vest more than considerable discretion in Thompson as the reviewing body, place no time constraints upon the review process that prevent the proposed commentary from becoming moot by delay, refer to no appeals process, and present the likelihood of self-censorship by eliminating the possibility of anonymous speech that may discourage potential speakers from coming forward. Under the guidance of these cases, the Court finds that Thompson's directives trigger the NTEU standard. *Milwaukee Police Assn.*, 192 F.3d at 749-50.²

The first step in applying this standard is to determine whether the speech at issue is a matter of public concern, for

² Defendants cite *Messman v. Helmke*, 133 F.3d 1042, 1047 (7th Cir. 1998), for the proposition that the high level of scrutiny employed in NTEU is not applicable to lesser restrictions on speech or association. While the Court agrees with this assertion in principle, it is inapposite here as the restriction in this case is a blanket restriction on speech applicable to all OIG staff, is not closely related to the legitimate harms that Thompson purportedly sought to avoid, operates to cut off many, if not all, venues for employees to voice their concerns and is therefore materially distinguishable from the lesser restriction in *Messman*.

when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). In determining whether the speech is a matter of public concern, the content, form, context, and motivation of the speech must be considered, with content being the most important factor. *Horwitz v. Board of Education of Avoca School District No. 37*, 260 F.3d 602, 618 (7th Cir. 2001), citing *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998); *Connick*, 461 U.S. 138, 103 S. Ct. 1690.

Here, the facial content of Plaintiffs' emails is essentially undisputed, as the emails in question are of record. On their face, the text of the emails express the writers' desire to communicate unspecified concerns over who they thought was going to be appointed as the Bureau Chief for the Southern Bureau and stress that the concerns are "very important" and "serious" without further elaboration. Wernsing and the other signatories have testified that their concerns were based on their knowledge of Fuentes' poor performance during his prior tenure as Bureau Chief. Specifically, they feared that Fuentes' appointment would result in a return to a substantial case backlog (such as one that caused over a year's delay in the investigation of a death) and missing confidential files (which were subsequently found in the trunk of his car) that occurred during Fuentes' previous appointment.

Thompson contends that this case is analogous to *Taylor v. Carmouche*, 214 F.3d 788 (7th Cir. 2000), in which the Court of Appeals found criticism of an appointed supervisor to be a purely personal concern as employees and therefore

unprotected. In Taylor, a lawyer and secretary deemed the newly appointed city attorney a “racist” and complained that she was a stern taskmaster, condescending, insensitive, and touchy. *Id.* at 790-91. These are clearly personal complaints going to the plaintiffs’ relationship with the new city attorney as employees rather than any concern by them as citizens to prevent official misconduct. Such is not the case here, where there was a prior restraint on speech, and the speech involved an effort by employees to bring to light claims of actual mismanagement and gross negligence in the conduct of OIG business by Fuentes, which had placed the recipients of DHS services in physical danger during his tenure due to seriously delayed investigations. This is not merely speech on internal personnel matters, but rather addresses a more far reaching issue of public concern. Although the emails were vague and lacking in specific details, the text of the emails can reasonably be read to support Plaintiffs’ asserted public purpose in speaking, as well as the contention that their complaints were motivated by considerations of public safety and the welfare of the mentally ill and developmentally disabled persons receiving DHS services who did not receive adequate protection during Fuentes’ alleged mismanagement of the Southern Bureau.

Additionally, Wernsing has stated that the directives have chilled her from several specific types of speech, namely: (1) responding to inquiries about OIG policies from persons working at community facilities; (2) commenting publicly on recent changes to Administrative Rule 50, which governs investigations of alleged abuse or neglect in state-operated facilities; and (3) commenting on the fact that the OIG was going to delegate investigations of serious injuries at community health centers to the facilities themselves. Thompson argues that this assertion contradicts her deposition testimony, in which she responded to a question about who

she wanted to speak to by stating “there wasn’t anything *at that point* except for my union rep with my grievance.” (Emphasis added.) In this respect, Wernsing is now clarifying that while there wasn’t initially other communication that she had in mind, she was chilled from speaking out on other topics that arose as time went on under Thompson’s tenure. For example, Wernsing inquired about talking to her union representative in January 2001, while the record indicates that Thompson issued a document containing the changes to Administrative Rule 50 in May 2002. Accordingly, the Court disagrees that the assertions contained in Wernsing’s affidavit were inconsistent with her deposition testimony.

This would qualify as speech on a matter of public concern, because an “employee’s ability to highlight . . . breaches of public trust is a critical weapon in the fight against governmental corruption and inefficiency.” *Wainscott*, 315 F.3d at 849. Defendants do not make any real effort to argue otherwise, making only the casual comment that no message of public concern was actually conveyed in the emails. However, this misses the point, because it ignores the context of the communications. The essence of a prior restraint is that it preempts or chills communications that have not yet happened, such as the comments that Plaintiffs desired to make to the DHS Secretary or their legislators after Thompson declined to give them an audience.

Having found the speech to be of public concern, the Court must next “balance the interest of the public employee, as a citizen, in commenting upon matters of public concern with the interest of the State, as an employer, in promoting effective and efficient public service.” *Pickering*, 391 U.S. at 571. Defendants bear the burden of demonstrating that its interests outweigh not only the interests of the Plaintiffs in speaking, but also the interests of both potential audiences and

a vast group of present and future employees in a broad range of present and future expression.

Plaintiffs argue that the balance of interests weighs against Thompson's directives, as "the general public and the legislature . . . have a strong interest in hearing from OIG employees regarding the failures of the OIG to faithfully carry out its duty to see that the most vulnerable among us are not abused." Plaintiffs clearly have an interest in exposing mismanagement or poor performance by the individuals charged with investigating and protecting the rights of the mentally or physically disabled, and the public has a substantial interest in receiving this type of information. The question then becomes what interests Thompson was attempting to serve by imposing the restriction on their speech.

It is not difficult to see that the OIG would have a substantial interest in protecting the confidentiality of its investigations. However, the confidentiality of these investigations is already mandated by Illinois statute (e.g., 740 ILCS 110/1 et seq.) and other OIG policies. "Where the government singles out expressive activity for special regulation to address anticipated harms, the government must 'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.' *Harman*, 140 F.3d at 121. This point is well taken, as there has been no evidence of harm to date, such as incidents in which employees have previously released confidential information from OIG investigations. Nor has there even been evidence that employees were likely going to release confidential information from their investigations.

Moreover, neither the directives implemented in this case nor the clarifying statements that were subsequently made to the Plaintiffs are remotely tailored to serve the asserted interest in a direct or material way and are overbroad in that they go far beyond any legitimate interest Thompson may have had in assuring the confidentiality of OIG investigations. On their face, the directives bar all communications regarding OIG policies or operations to any "external agent", which Thompson subsequently defined as any individual who was not privy to information relating to an ongoing or closed investigation. Moreover, the facially unrestricted scope of the directives actually purports to limit even communications that are expressly protected by other Illinois statutes, specifically the disclosure of mismanagement, abuse of authority, criminal misconduct, and other similar communications that are protected by the Whistleblower Protection Act and Personnel Code.

Thompson conceded in his deposition that he made no attempt to find out what the concerns of the Plaintiffs and the other signatories to the email were prior to issuing the directive. He further stated that he really had no idea where they were coming from or what they wanted to talk about. There is nothing in the record to suggest that Thompson had any reason to believe that Plaintiffs' proposed communications had anything to do with confidential information from OIG investigations. Despite Thompson's best efforts to recharacterize the scope of the directives in his summary judgment briefs, he has yet to articulate what real and nonconjectural harms he was trying to prevent by suppressing speech and further admitted that his rationale for issuing the directives was that he was new to the position, knew about litigation that had been going on regarding another appointment in the OIG, and "didn't want to be sabotaged in some way or some manner" because he "just didn't know

what their motives were." Thompson has also indicated that, in his opinion, an employee contacting a legislator about him would violate the directive, which suggests that his motive was not assuring that OIG investigations remain confidential as required by Illinois statute.

Thus, the only asserted rationale for implementing the directives that a reasonable jury could find to be supported by the record was Thompson's personal concern to avoid being "sabotaged", rather than any purported interest in improving the efficient provision of public services or protecting the confidentiality of the investigative process. Such a concern is clearly outweighed by Plaintiff's interest in speaking out on a matter involving alleged administrative incompetence that could ultimately implicate the public safety. Thompson has simply failed to carry his burden of demonstrating that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by any 'necessary impact on the actual operation' of the Government that Plaintiffs' proposed speech may have had. Plaintiffs' speech was therefore entitled to constitutional protection.

Thompson argues that he is protected by the so-called "policymaker" exception set forth in *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), based on the contention that Plaintiffs were policymakers or confidential employees, and cites precedent to the effect that a public employer may discharge a policymaking or confidential employee who publicly takes a position inconsistent with that of his employer. However, as the Court previously stated at the motion to dismiss stage of this litigation, the precedent cited involves disciplinary action taken after the speech in question had occurred and does not establish that the "policymaker" exception (even assuming its

applicability in this case) applies in the same manner to cases involving prior restraints on speech, where preclearance requirements may have a broad inhibiting effect on all employees by causing "self-censorship by speakers in order to avoid being denied a license to speak." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).

Whether the "policymaker/confidential employee" exception is applicable in the context of a prior restraint on speech appears to be an issue of first impression. Nevertheless, even assuming arguendo that the exception can be extended to apply under the facts of this case, and making the highly improbable assumption that Plaintiffs are in fact "confidential employees" or "policymakers" within the meaning of the exception,³ Thompson has shown only that Plaintiffs had access to confidential files, had a preexisting duty to maintain the confidentiality of their investigations pursuant to statute and DHS regulations, and that Thompson was afraid that they might sabotage him by breaching confidence. The record reveals no legitimate basis for his presumption that their speech involved the OIG's confidential investigations, would constitute a breach of confidentiality, or amounted to interference from disloyal employees. Furthermore, it is well-settled in this circuit that an employee's access to confidential information and an employer's fear that the employee will possibly breach confidence is insufficient to satisfy the policymaker exception as a matter of law. *Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir. 1991), citing *Meeks v. Grimes*, 779 F.2d 417, 421 (7th Cir. 1985). Thompson has therefore failed to meet his

³ See *Thornburg v. Peters*, 155 F. Supp. 2d 984 (C.D.Ill. 2001).

burden of justifying the restriction pursuant to the policymaker exception.

II. Retaliation

Thompson also moves for summary judgment on Plaintiffs' § 1983 retaliation claim. Section 1983 creates a federal cause of action for the "deprivation, under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and the laws of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994). It is not itself a source of substantive rights; instead it is a means for vindicating federal rights conferred elsewhere. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979). The initial step in any § 1983 analysis is to identify the specific constitutional right which was allegedly violated. *Graham v. Connor*, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). Here, Plaintiffs claim that they were retaliated against for having exercised their First Amendment rights by sending the emails to Thompson.

"It is well established that 'an act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.'" *Abrams v. Walker*, 307 F.3d 650, 654 (7th Cir. 2002), citing *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). In order to establish a prima facie case of First Amendment retaliation, a plaintiff must establish that: (1) his or her conduct was constitutionally protected, and (2) that his or her conduct was a "substantial factor" or "motivating factor" in the defendant's challenged actions. *Id.* The Seventh Circuit has further held "that even if a defendant was 'brimming over with unconstitutional wrath' against a § 1983 plaintiff, that plaintiff cannot prevail unless he or she establishes that the challenged action would not have occurred

'but for' the constitutionally protected conduct." *Id.*, citing *Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987). If the plaintiff can make this showing, the burden then shifts to the defendant to show that he would have taken the same actions even absent the protected conduct. *Id.*

Here, Plaintiffs allege acts of retaliation including not only the prior restraint of their speech contained in the directives, but also: (1) an incident when Thompson yelled at Wernsing and threatened her with termination after she inquired about the definition of "external agent" contained in the directives; (2) Thompson's denial of overtime pay and mileage to Wernsing and Bingaman after the requests had been approved by their immediate supervisor and the Bureau Chief; (3) Wernsing was warned by the Bureau Chief to watch out because Thompson was watching everything that she did; (4) the downgrading of Wernsing and Bingaman's annual performance evaluations following the emails; (5) the introduction of false and misleading evidence at Bingaman's grievance hearing; (6) the denial of Bingaman's application for the position of Southern Bureau Chief; (7) the denial of appropriate/customary travel and lodging expenses for both Wernsing and Bingaman on different occasions; and (8) Thompson's denial of an approved salary differential for the time when Bingaman served as acting Investigative Team Leader.

The Court has previously found that Plaintiffs' attempt to communicate with Thompson on matters going to the competency and efficiency of the OIG and revealing past instances of mismanagement that arguably impacted public safety were matters of public concern and that Plaintiffs' interest in communicating this information outweighed any legitimate interest Thompson may have had in preventing the communication, as he made no effort to determine the nature

of Plaintiffs' speech before implementing fatally overbroad directives that were not materially related to the subject of the proposed speech. Thus, the Court has found that Plaintiffs' speech was entitled to constitutional protection. When the record is viewed in the light most favorable to Plaintiffs as the non-moving parties, as the Court must at this stage of the litigation, they have demonstrated for purposes of this motion that their speech was a substantial or motivating factor in Thompson's issuance of the directives, as Thompson admitted in his deposition that there was nothing other than Plaintiffs' emails that caused him to draft and sent out his directives. They have also met their burden of showing a qualitative change in the terms and conditions of their employment for purposes of resolving this Motion. *See Johnson v. Cambridge Industries, Inc.*, 325 F.3d 892, 901 (7th Cir. 2003).

Accordingly, the burden shifts to Thompson to establish that he would have taken the same actions but for Plaintiffs' speech. In this respect, the Court finds a genuine issue of material fact that remains for trial. While Thompson has introduced evidence suggesting that his actions were motivated by other considerations, Plaintiffs' have introduced the testimony of Mott that Thompson called her in response to Plaintiffs' emails and threatened consequences if the signatories contacted any legislators and remarked that he "could play that game." Mott also testified that Thompson expressed his anger at Wernsing to her, yelling, "What is it with you people; I'm tired of these games; I am angry." Mott indicated that after she had completed evaluations for Wernsing and Bingaman following their emails to Thompson, Thompson changed the policy on evaluations so that he could play a more active role and implemented criteria that required her to downgrade Plaintiffs in part for their role in sending the emails. After Mott served as Bingaman's technical advisor at his grievance hearing, she was suspended even though she

was under a subpoena to appear at the hearing. Mott further testified that Bingaman was the only acting investigative team leader who was not promoted to Bureau Chief but was actually demoted to an investigator's position, and she was informed by the DHS personnel director that she was appointed to Southern Bureau Chief in order to deny the position to Bingaman. A reasonable jury could find that Mott's testimony links Thompson's alleged retaliatory acts to Plaintiffs' speech, providing a sufficient nexus between the protected activity and Thompson's actions to survive summary judgment.

There are other examples of evidence in the record on both sides of this question. However, the Court need not address every possible example, as it is clear that there is a genuine issue of material fact requiring resolution by a jury and precluding the entry of summary judgment in favor of Thompson on Plaintiffs' retaliation claim.

III. Qualified Immunity

Thompson also argues that he is entitled to qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), the United States Supreme Court enunciated the "modern standard to be applied in qualified immunity cases." *Auriemma v. Rice*, 895 F.2d 338, 341 (7th Cir. 1990). The Court stated:

Governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 457 U.S. at 818. The test for qualified immunity is "whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted." *Green v. Carlson*, 826 F.2d 647, 649 (7th Cir. 1987). In deciding whether a defendant will enjoy qualified immunity, courts must determine: "(1) whether the plaintiff has asserted a violation of a federal right, and (2) whether the constitutional standards implicated were clearly established at the time in question." *Eversole v. Steele*, 59 F.3d 710, 717 (7th Cir. 1995), citing *Kernats v. O'Sullivan*, 35 F.3d 1171, 1176 (7th Cir. 1994). The first issue is a threshold one. If the plaintiff fails to state a violation of a federal right, then the plaintiff's claim fails altogether and the court need not go on to decide whether the law was clearly established at the time of the offense. See *Marshall v. Allen*, 984 F.2d 787, 793 (7th Cir. 1993); *Zorzi v. County of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994); *Eversole*, 59 F.3d at 717. In outlining the approach a court must take in addressing qualified immunity, the Seventh Circuit has advised:

Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law.

Landstrom v. Ill. Dept. of Children & Family Serv., 892 F.2d 670, 675 (7th Cir. 1990), quoting *Rakovitch v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 497, 488 U.S. 968, 102 L. Ed. 2d 534 (1989).

Based on the record before the Court, Plaintiffs have established that Thompson's directives operated as a prior

restraint in violation of their First Amendment right to freedom of speech and have survived summary judgment on their retaliation claim. The question then becomes whether their right to be free from such a restriction was clearly established on December 5, 2000, when the first directive was issued. The Court notes that long before Thompson issued his directive, the Supreme Court had held that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Davis*, 114 S. Ct. at 914; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). In fact, it was equally well-established that prior restraints, often referred to as a "most extraordinary remedy", have been upheld "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." *Davis*, 114 S. Ct. at 914.

More specifically on the issue of First Amendment retaliation, the Seventh Circuit has held:

It was . . . clear in June 1996 that government employees had a First Amendment right to speak on matters of public concern that must be weighed against the employer's right to punish insubordination. [The employer] cannot claim not to have known that disciplining [the employee] under these circumstances would not implicate her right to free speech.

Myers v. Hasara, 226 F.3d 821, 829 (7th Cir. 2000). Thus, it was clearly established prior to December 2000 that if Plaintiffs wanted to speak on a matter of public concern, and their interests in doing so outweighed any of Thompson's legitimate interests, precluding their speech without substantial justification and retaliating against them for that speech would be illegal.

Thompson has made no showing that the proposed speech presented a likelihood of imminent lawless action or that the speech would have materially and substantially interfered with the requirements of appropriate discipline in the operation of the OIG. To the contrary, all that has been demonstrated is Thompson's subjective belief that the proposed speech might be an attempt to somehow sabotage his appointment. This is plainly insufficient to justify the broad prior restraint on speech imposed by the directives under the precedent cited above, and it should have been apparent to a reasonable official that attempting to enforce the directives against Plaintiffs or other OIG employees would violate their constitutional rights.

Thompson suggests that Plaintiffs must cite to cases with very similar facts in order to overcome qualified immunity and note a lack of authoritative cases finding similar conduct to be unlawful in factually similar circumstances. However, this is a somewhat inaccurate articulation of how qualified immunity operates. In *Hope v. Pelzer*, 536 U.S. 730, 153 L. Ed. 2d 666, 122 S. Ct. 2508, 2515 (2002), the Supreme Court stated:

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . .

The Court went on to note that a "fundamentally similar" or "materially similar" factual situation is not required in order for a right to have been "clearly established"; rather, the state of the law must only be such as to give a defendant

"reasonable" and "fair" warning that his conduct would deprive an individual of a constitutional right. *Id.* The Court further cited to its 1997 decision in *United States v. Lanier*, 520 U.S. 259, 270-71, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997), in noting that "general statements of the law are not inherently incapable of giving fair and clear warning" and "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" In other words, although the unlawfulness of the conduct in question must be apparent in the light of preexisting law, there is in fact no requirement that a plaintiff cite to cases with "very similar" facts, as suggested by Thompson, and an "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 122 S. Ct. at 2516.

As the above-cited case law was in existence prior to December 2000 and was sufficient to give Thompson fair warning that his prior restraint of Plaintiffs' speech was unconstitutional, the Court finds that Thompson's issuance of the directives violated clearly established statutory or constitutional rights of which a reasonable person would have known and is therefore not exempt from suit under the doctrine of qualified immunity. Likewise, as it has been clearly established since 1996 that retaliation for the exercise of First Amendment rights would be unlawful, and Plaintiffs have raised a genuine issue of material fact requiring resolution by a jury as to whether Thompson acted in retaliation for their speech, Defendant Thompson is not entitled to qualified immunity on this claim as well.

IV. Continuing Violation

Defendants argue that Plaintiffs have made no attempt to establish that they are being subjected to a continuing violation of federal law, as the directives were issued by Thompson, and he is no longer the Inspector General. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000), the Supreme Court held that voluntary cessation of allegedly illegal conduct does not render a case moot unless the defendant can demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." The rationale for this is that in the absence of such a rule, a defendant could voluntarily cease the challenged conduct in order to moot the lawsuit, and then immediately "return to his old ways" once the coast was clear. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953). Defendants bear a heavy burden in making this showing that the matter is moot. *Id.* at 633.

Defendants have now submitted the sworn affidavit of Roberts, who succeeded Thompson as the Inspector General in February 2003. In her affidavit, Roberts states:

Confidential issues relating to the Office of the Inspector General are covered by statutes and the Illinois Administrative Code. The employee handbook promulgated by the Department of Human Services of the State of Illinois contains provisions relating to media contacts and legislative inquiries. Affiant has not issued any directives dealing with the issue of confidentiality of agency operations. I am familiar with the allegations contained in the matter entitled *Wernsing v. Thompson*, No. 01-3237 (USDC

C.D.Ill.). I have reviewed the letter sent by Odell Thompson to the plaintiffs and I have reviewed the January 2001 newsletter which is at issue in the case. I have sent no letters or newsletters to any employee of DHS which contains the language which is at issue in that case, and I have taken no action as to any employee based on the newsletter. I do not consider the above referenced letter and newsletter to be the official policy of the Office of the Inspector General.

(Roberts Affidavit, PP3-6.) Although this is not the clearest disavowal of the continued viability of Thompson's directives, the Court does find Roberts' uncontested affidavit marginally adequate to establish that she does not consider the directives to be in force under her tenure as Inspector General and that there is not a substantial likelihood of future enforcement or reinstatement of Thompson's directives. As Defendants have sufficiently demonstrated that the policy from which Plaintiffs sought relief no longer exists and that the illegal prior restraint of speech at issue in this case cannot reasonably be expected to reoccur, the claim for injunctive relief is effectively moot, as there is no need to enjoin prospective action that would violate federal law. The exception of Ex Parte Young, therefore, does not apply to lift the bar of sovereign immunity otherwise imposed by the Eleventh Amendment against claims that are effectively against the State of Illinois, and Defendants are entitled to judgment in their favor on this aspect of Plaintiffs' Complaint. As Roberts was only named as a Defendant for purposes of injunctive relief, she is no longer a necessary party to this litigation and is hereby dismissed.

Conclusion

For the reasons set forth above, the Motions for Partial Summary Judgment [# 36 & # 41] by Wernsing, Bingaman, and Cannon are GRANTED in that the Court finds as a matter of law that their speech was entitled to constitutional protection and that Thompson's directives operated as an unlawful prior restraint. Defendants' Motion for Summary Judgment [# 43] is GRANTED IN PART and DENIED IN PART. Defendant Roberts is hereby TERMINATED as a party in this matter. The final pretrial conference remains set as previously scheduled for 11:00 a.m. on October 30, 2003, in person in Peoria.

ENTERED this 9th day of October, 2003.

Michael M. Mihm

United States District Judge